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Issue Date: 16 November 2005

CASE NO. 2004-LHC-1122
2004-LHC-2352

OWCP NO. 15-42895
15-47785

In the Matter of:

SAILI RYAN,
Claimant,

v.

NAVY EXCHANGE PEARL HARBOR
Permissibly Self-Insured Employer,
and

CRAWFORD & CO.,
Third Party Administrator,

Appearances:

Steven M. Birnbaum, Esq.
For Claimant

William N. Brooks II, Esq.
For Navy Exchange Pearl Harbor and Crawford & Company

Before: The Honorable Gerald M. Etchingham
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS AND ATTORNEY FEES

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq*. ("the Act"), and the regulations promulgated thereunder. Saili Ryan ("Claimant") filed claims against Employer, Navy Exchange Pearl Harbor, and its Carrier, Crawford & Company, ("Employer") for injuries she sustained while employed by Employer from approximately 1995 to 1998. This matter was assigned to me on August 21, 2004, and I held a formal hearing on January 26, 2005 in Honolulu, Hawaii.

For the reasons set forth below, I award Claimant temporary total compensation benefits for her cumulative trauma injury from July 27, 1998 to October 30, 2000, the date Claimant reached maximum medical improvement as to her claim. I also award Claimant permanent total compensation benefits from October 31, 2000 through January 10, 2005, the date that Employer showed that suitable alternative employment was available to Claimant. Finally, I award permanent partial compensation benefits to Claimant from January 11, 2005 to the present and continuing. Claimant is also entitled to recover her reasonable medical expenses from November 3, 1996 to the present and such future medical care as may be reasonable and necessary for the treatment of the injury to Claimant's back, including surgery, if sought by Claimant, and her reasonable attorney fees and costs.

STIPULATIONS

At the hearing, the parties stipulated that:

1. The Longshore and Harbor Workers' Compensation Act applies to this claim;
2. An employer/employee relationship existed between Claimant and Employer at the time of alleged injury;
3. The place of alleged injury was the Navy Exchange, Pearl Harbor, Hawaii;
4. Claimant has reached maximum medical improvement as to her alleged physical injuries;
5. Claimant is not working currently;
6. This claim involves alleged unscheduled injuries to Claimant's neck, back and arms, as well as an alleged psychological claim.

TR at 30-32; CX 1; EX 1-3; EX 5-8; ALJX 2; ALJX 4; ALJX 7 at 2. Because there is substantial evidence in the record to support the foregoing stipulations, I accept them.

ISSUES FOR RESOLUTION

1. Are the claims barred for failure to timely give notice of injury and file the claims?
2. What is the nature and extent of Claimant's injury?
3. When did Claimant reach maximum medical improvement?
4. When, if ever, did Claimant's disability become permanently partial?
5. What is Claimant's average weekly wage for calculation of her disability benefits?
6. What, if any, medical benefits are Claimant entitled to recover?

PROCEDURAL BACKGROUND

Claimant and counsel for both parties appeared and participated at the hearing on January 26, 2005. At trial, ALJ Exhibits 1-5 were admitted. Claimant Exhibits ("CX") 1-9[1] were admitted, but CX 7 was voluntarily withdrawn by Claimant. TR at 10-13, 21-22. A deposition transcript of Dr. Won Yee Cheng was submitted on February 10, 2005 and is marked and entered

[1] Claimant's exhibits 3, 5, 7, and 9 (Dr. Loo's late submitted January 23, 2005 report) were not actually produced at trial but were admitted into evidence. They were submitted to me with Claimant post-trial brief on June 10, 2005.

into evidence as CX 9. TR at 25-28. Employer Exhibits ("EX") 1-13 were admitted. TR at 13-21. After trial concluded, Employer sought to submit EX 14-16 into the record. EX 15, a report by Dr. Boyd Slomoff, was admitted at trial over Claimant's untimely post-trial objection; EX 14 and EX 16 were excluded. TR at 13-20; *see also* Orders issued January 4 and April 6, 2005. Claimant's motion to re-open discovery was denied. After reconsideration and further review of the transcript, EX 14, which is limited to Claimant's additional medical records[2], was also admitted into evidence. TR at 17-20. Post-trial briefs were submitted by both parties and upon receipt, the record closed on June 13, 2005. Claimant's post-trial brief was marked and entered into the record as ALJX 6 and Employer's post-trial brief was marked and entered into evidence as ALJX 7.

FACTUAL BACKGROUND

Claimant, Saili Ryan, was born in 1948. She married her husband, Charles Patrick Ryan, in 1965, and has three children and five grandchildren. TR at 116, 188; EX 15 at 315. Claimant was born and raised in West Samoa. EX 12 at 132.

In Samoa, Claimant worked as a clerk for the Agriculture Department for eight years. EX 12 at 151. She attended college for two years in New Zealand but did not receive any degree. Claimant and her husband immigrated to Hawaii in 1978. CX 9 at 155. She completed her GED at Farrington High School in 1980. EX 12 at 132-33. Claimant worked for two years at a snack bar in Honolulu, and after that, she worked at the Marine Base Kaneohe for over a year. EX 12 at 148-50.

In 1982, Claimant began to work for the Marine Corps at the Pearl Harbor base in Honolulu, Hawaii as a food service worker. Sometime between 1993 to 1995, Employer took over the base where Claimant was working. EX 12 at 136; TR at 117. Claimant worked at several different facilities through her employment with the Marine Corps and later Employer, including Café Pearl and Market Street Grill. EX 12 at 139.

Claimant's duties included preparing "plate lunches, burgers, sandwiches, soup," cleaning up after customers, acting as a cashier, and other cleaning and cooking duties in the kitchen. EX 12 at 139-40. Claimant's work regularly required her to empty a large frying pan that contained hot oil, throw away rubbish bags, lift supplies of food items, and fill an overhead ice dispenser. TR at 121-124. The frying pan and rubbish bags weighed about 30 pounds. TR at 122. Some of the food supply boxes weighed around 50 pounds. TR at 123.

Claimant stated that she enjoyed working because "I make a lot of friends and I like making useful of myself." TR at 119. She also states that she had good relationships with supervisors, including James Cole and Evalani Newbourg. TR at 119-20. Claimant remembers that her wage was $8 or $8.75 an hour, and that she worked a little less than 40 hours a week. EX 12 at 147-48. Employer wage records in the year prior to her last day of work on July 7,

[2] I find the medical opinions of Dr. Kenneth N. Luke particularly relevant in EX 14 while I give no weight to the decision rejecting Claimant's Social Security Administration ("SSA") claim by Administrative Law Judge Henry M. Tai on December 7, 2000 as approving claims at SSA is subject to different regulations and standards than come under the Act. *See 42 U.S.C. §§301 et seq*. versus the Act.

1998, however, indicate that Claimant worked 1,402.74 hours, or approximately 26.98 part-time hours per week averaged over a year's time. EX 8 at 109-10.

Employer's Human Resource Manager, Veronica Manz, testified that Employer provided all of its employees with training paperwork that they were to complete when they started working for Employer. Specifically, the "Certification and Training Record" discusses workers' compensation issues and procedures. Claimant signed and dated a "Certification and Training Record" in 1995. TR at 77, 106; EX 6 at 83-84. Generally, the employee has responsibility to report any injury immediately, and the manager has responsibility to fill out the appropriate paperwork to turn into the Human Resources Department within 24 hours. Employer gave all managers necessary training in this regard. TR at 79.

Ms. Manz further testified that when an employee is injured at work and is receiving workers' compensation benefits, Employer's Human Resource Department makes every effort to return them to light duty work. These positions are often available at the Distribution Center and the administrative offices. TR at 82-83. Human Resource Department personnel would first call some of these departments to see if they have any positions open that are typically suitable for light duty limitations, and once they locate available positions, they would contact the doctor's office to request a fax of the employee's limitations. They then match the employee's limitations with the available light duty positions. Lastly, the Human Resource personnel will contact the injured employee to offer him or her the position. TR at 96-97. The pay rate for the light duty work remains the same as the injured worker's previous position. TR at 112.

On November 3, 1996, some time after the morning rush and before lunch, Claimant asserts that she injured her arm, neck, and shoulder while lifting a carbon dioxide canister for the soda fountain. TR at 124. The canister weighted about 50 pounds, and Claimant had to lift it over a lever that was several inches tall to position it into the fountain machine. EX 12 at 155; TR at 124-25. Claimant felt a pull on her right shoulder and neck muscle. EX 12 at 157; TR at 125. Claimant was allegedly working with Evalani Newbourg at the time and she told Mrs. Newbourg about the injury. Mrs. Newbourg allegedly told Claimant to "just take it easy" because Mrs. Newbourg had hurt herself in similar ways. TR at 125-26. Claimant also testified that she told Mr. Ko, her previous supervisor, of her injury sometime within that week. EX 12 at 159-61. However, no injury report was filed until July 14, 1998. EX 7 at 95. Claimant finished her shift that day and went to work the next day as well. TR at 126-27. Claimant states that as time went on, the discomfort in her shoulder, arm, and neck spread to her left leg. TR at 127.

Claimant first visited Kaiser Permanente health center to seek medical treatment on February 7, 1997. EX 5 at 23-24; TR at 128. Claimant states that she told the Kaiser physician upon the first visit that she had injured herself at work while lifting a heavy object. TR at 129. However, the Kaiser records showed that Claimant complained of right arm pain for about one week, and denied any other complaints of pain or recent trauma. EX 5 at 23-24; TR at 60.

On February 12, 1997, Claimant saw Dr. Peter Nikaitani of Internal Medicine at Kaiser, and complained that her "[right] arm [had been] sore [for] almost two months." EX 5 at 25. She was referred to a radiologist for "cervical spine and right shoulder pain [from] neck radiating into right shoulder of arm [for] approximately two months." The radiologist, Dr. Daniel Collin,

found "calcific tendonitis" of the right shoulder and "minimal degenerative spondylosis" of the cervical spine. CX 1 at 41; EX 5 at 26.

On March 18, 1997, Claimant saw Dr. Merle Miura-Akamine, in Physical Medicine and Rehabilitation at Kaiser and described "a four month history of neck and right arm pain." Claimant rated her pain a 10 on a scale of 1 to 10, and described weakness in her right arm, difficulty opening jars, and pain that sometimes awakened her at night. EX 5 at 27. Dr. Miura-Akamine observed that "patient was pleasant and cooperative. She did appear to be in a lot of pain." She found "decreased cervical lordosis of the neck" and observed a limited range of motion in the cervical area. Dr. Miura-Akamine suspected right C7 radiculopathy and probably right carpal tunnel syndrome, and recommended an EMG/nerve conduction study to verify her impressions. EX 5 at 28. She changed Claimant's medication because she was not receiving much relief with her prior prescription. EX 5 at 28. Claimant was still working 40 hours a week at that time. EX 5 at 28. Claimant received a work slip diagnosing her with "C7 radiculopathy," which rendered her disabled from work from March 18 to 25, 1997, but permitted her to return to full duty on March 26, 1997. CX 1 at 50.

On March 25, 1997, Dr. Miura-Akamine found the EMG and nerve conduction "normal" with "no electro-diagnostic evidence of right carpal tunnel syndrome or right cervical motor radiculopathy," but noted that Claimant was not feeling any better with the new pain medication. Dr. Miura-Akamine recommended the Claimant stay off work until April 7, 1997 and to resume fully duty thereafter. EX 5 at 32; CX 1 at 49. Subsequently, Dr. Miura-Akamine wrote out another work slip for Claimant to take her off work from April 16 to May 12, 1997. She diagnosed Claimant with right cervical radiculopathy. CX 1 at 48.

The MRI of Claimant's cervical spine was interpreted on June 6, 1997; the radiologist commented on the results in detail:

> "The C2-3 disc and neural foramina appear unremarkable. A left paracentral bulge at C3-4 effaces the ventral thecal space and causes some lateral recess encroachment, without significantly deforming the cervical cord. There is also some minimal end-plate spurring at this level. Neural foramina are reasonably well maintained bilaterally. End-plate spurring is more prominent at this C4-5 level. There is also a right paracentral bulge, and the combination results in effacement of the ventral thecal space and mild deformity of the cord as well as right lateral recess and right neural foraminal stenosis. This appearance is similar at the C4-5 level except that the spurring and disc bulge is in the left paracentral region, resulting in left lateral recess and left neural foraminal stenosis. At C6-7, end-plate spurring and bulge is more diffuse and central in location, effacing the ventral thecal space without significantly deforming the cervical cord. Neural foramina are reasonably well maintained at the C6-7 level. C7-11 disc and neural foramina and 11-[12] disc and neural foramina appear unremarkable."

CX 1 at 40; EX 5 at 29-30.

On August 14, 1997, Dr. John Graham, a neurologist, was consulted regarding Claimant's persistent arm pain on the right side with associated numbness and tingling of the right hand and her recent gradual onset of back pain and left leg pain. Dr. Graham's impression

was "chronic cervical radiculopathy, more likely C5-6, with secondary radicular arm pain on the right and depressed biceps reflex on the left." He recommended C4-5 and C5-6 anterior diskectomy if her pain persisted. CX 1 at 33. .

On December 1, 1997, Dr. Miura-Akamine saw Claimant again and noted that "patient does not want to consider surgery to her neck, despite the fact that we have exhausted all conservative measures without success." Claimant explained that she wanted to "take off work for awhile to do [physical therapy]," but Claimant could not afford to pay for physical therapy. EX 5 at 37; TR at 63. Dr. Miura-Akamine wrote a work slip for Claimant, but the dates are illegible. CX 1 at 47. Claimant explained that she did not want to undergo surgical procedures because there were no guarantees of success and she "might be on the wheelchair forever," and because she would need to pay for the surgery. EX 12 at 186-87. Claimant reportedly tried physical therapy for 18 weeks and felt that it "did nothing." EX 5 at 38; EX 15 at 302.

Sometime around April 1998, Claimant was transferred from Café Pearl to Baskin Robbins, most likely due to her injury and request for light duty work. TR at 132-33. There were less heavy trash to throw away at Baskin Robbins, and most of the duties consisted of bending down into a freezer and scooping ice cream. When Claimant worked there, she claimed that her arm, both legs, back, and neck problems worsened. TR at 134-35.

On June 4, 1998, radiologist Dr. Peter Clapp determined that Claimant had "degenerative disc disease of the cervical spine" and "a narrowing of the C4-5 disc with secondary degenerative changes" and a "very early foraminal encroachment" that was "most marked at C4-5 on the right of doubtful significance." Dr. Clapp observed that "other disc spaces and vertebral body heights appear well maintained and posterior elements are intact." CX 1 at 39; EX 5 at 31.

On the same day, Claimant was also seen by Dr. Janice Fong, and Claimant stated that her "pain was getting worse." Dr. Fong took Claimant off work from June 4 to 7, 1998 with a diagnosis of lumbar strain, noting work limitations that included "no ice cream scooping," no lifting of objects over 25 pounds, and only occasional bending, squatting, kneeling, and climbing. CX 1 at 26.

In 1998, Claimant terminated the services of her first attorney in this case, and she began to look for another attorney. CX 9 at 157. She recounted that this experience made her feel anxious. CX 9 at 157.

Around July 7, 1998, Claimant stated that after presenting Employer with her work restriction slip, she was told that there was no light duty position for her and that she was to stay home until further notification from the Employer. TR at 137-39. Claimant did not return to her employment after July 7, 1998. EX 6 at 93.

On July 14, 1998, Claimant filed a Notice of Injury to Employer, stating that she injured her "spinal cord" and her "left leg and right arm [were] sore" as a result of "lifting, moving and throwing heavy rubbish bags" while working at Café Pearl in November 1996. EX 7 at 95.

On July 16, 1998, Dr. Sandor of Kaiser's Occupational Medicine Department issued an interim industrial report for Claimant. Claimant described that "for the last year and a half [she] has had constant pain in the right side of her neck radiating to the lateral arm and also constant left buttock pain radiating to the left lower back. The pain runs 6-7 on a scale of 10 and is not relieved during the weekends or on vacations. It is more intense when working. There is numb sensation also in the same distribution on the right side of her neck down to the arm." Claimant represented to Dr. Sandor that "she has had an MRI of her neck and was told that there is a lot of disease."

Dr. Sandor observed that Claimant had a "depressed affect." He also noted that "the neck reveals exaggerated tenderness to light palpation of the dorsal process of approximately C4 and C7. There is no palpable muscle spasm . . . Range of motion of the shoulder is within normal limits. No motor abnormality can be found in the upper extremities. Sensation is intact to light touch . . . There is no muscular wasting." Dr. Sandor's impression was "degenerative joint disease of the cervical spine. Low back pain with evidence of bursitis which could be due to repetitive bending." However, at this meeting, Dr. Sandor did not have any prior medical record available for review. He released Claimant to full duty work, noting that Claimant should avoid repetitive bending at the waist and leaning forward into ice cream containers. CX 1 at 21; EX 5 at 38-39.

On July 21, 1998, after Claimant went to the emergency room with complaints of being unable to sleep because of pain from her neck area down to her buttocks, Dr. Sandor placed her on "limited duty" from July 21 to August 21, 1998, with a restriction of "no scooping ice cream." Dr. Sandor noted "a flattened to depressed affect and at times she is tearful when talking about her pain." Claimant was referred to pain management. CX 1 at 20, 22; CX 9 at 158. Employer was in receipt of the July 21 to August 21, 1998 work slip and was aware of Claimant's work limitations. EX 7 at 100.

On a July 30, 1998, in an interim industrial report, Dr. Sandor noted that "the patient today is smiling and she stated, 'They granted me disability.' 'I feel so much better, I am so relaxed.'" Claimant described to Dr. Sandor that since she can sit down whenever she wanted to and that her symptoms have greatly abated, but that the pain returns with prolonged walking but that it goes away "as soon as she sits down." Dr. Sandor believed that Claimant had chronic neck and back pain. He noted that since Claimant was asymptomatic with sitting, she was eligible for vocational rehabilitation for sedentary work. Dr. Sandor recommended an IME for a disability rating and eligibility for vocational rehabilitation for a sedentary position suiting Claimant's limitations. EX 5 at 40.

On August 5, 1998, Employer filed a Notice of Controversion, contending, among other things, that Claimant did not report the accident in a timely manner. EX 2 at 4.

On September 9, 1998, Claimant saw Dr. James McKoy at Kaiser's Pain Clinic for chronic pain management. Dr. McKoy's record noted that Claimant "did not remember a single traumatic event at work; though work as a cook requires repetitive movement and heavy lifting. She stated that the pain did begin at work following a period of heavy lifting." Claimant reported that her pain was causing sleep disorders and impairing her functioning in the household

chores and other activities. She described her neck and arm pain as a 10 on a scale of 1 to 10. However, Claimant described "no associated numbness or tingling." Dr. McKoy observed that Claimant had no difficulty walking or getting on the exam table, was "pleasant, oriented and willing to share information regarding her condition," and did not exhibit any excessive emotional distress. She was classified as a Class III chronic pain patient with no appreciable psychosocial disorders and was diagnosed with "chronic neck and back pain." The Pain Clinic offered her an 11-week pain management course using cognitive therapy, breathing techniques, visual imagery, relaxation, mindfulness, and other techniques. EX 5 at 41-43.

Around August and September 1998, Employer identified light duty work, and attempted a number of times to contact Claimant to gain information about her condition and obtain doctors' certifications and requests for light duty work. However, they were unable to contact Claimant as all the phone numbers available to them were not valid. TR at 88; EX 7 at 98-105.

On September 25, 1998, Employer sent Claimant a notice of termination letter notifying her that as she had not reported to work since July 7, 1998, she would be terminated for abandonment of her position, unless she contacted her manager by October 2, 1998. TR at 91-92; EX 6 at 93. Claimant received the letter soon thereafter. TR at 138-39. Employer's position was that if Claimant contacted Employer during that period, she would be entitled to light duty work. TR at 90. However, Employer could not provide a light duty work for Claimant until it received the work restrictions from the doctor. TR at 102.

On September 29, 1998, Claimant went to see Dr. Sandor. He noticed Claimant had a "very depressed affect, tearful but with an incongruent mood as patient says she is happy and denying any social problems with family or friends." Dr. Sandor recorded, "Patient appears to be suffering with a major depression which is complicating her recovery." He referred Claimant to make an appointment to have her mental health checked. EX 5 at 44-45.

Claimant testified that she showed the notice of termination letter to Dr. Sandor, and that he advised her that she was in no condition to go back to work and that he would take care of the termination notice. TR at 139-40. Claimant gave the notice to Dr. Sandor. TR at 140.

On September 29, 1998, Dr. Sandor determined that Claimant had reached maximum medical improvement for her chronic neck and back problems. He also believed that Claimant was disabled for work primarily for the affective disorder. He postponed the IME until after Claimant's affective disorder has stabilized, and took her off duty from work from September 29 to October 24, 1998. CX 1 at 15; EX 5 at 44.

On the same day, September 29, 1998, a staff person from Kaiser telephoned Employer and informed Dorin McKeague, Employer's Services Manager, that Claimant had been to Kaiser to see her physician, and that the physician had "put her on 'no duty' status effective today because of her mental stability . . . She was depressed and unresponsive and told her doctor [that Employer] sent her a letter to fire her." EX 7 at 104.

Veronica Manz, who began to work as Employer's Human Resources Manager on October 7, 1998, testified that this could constitute a response to the September 25, 1998

abandonment notice. Ms. Manz believed that a further investigation should be conducted upon receipt of that information from Kaiser. TR at 95. Ms. Manz explained that if the psychiatric conditions were not attributable to the industrial injury, Employer would not offer any light duty to Claimant in accommodation, as light duty work is only available in connection with work-related injuries. TR at 110-11.

Dr. Michael McCanless began to evaluate and treat Claimant in October 1998. On October 8, 1998, Claimant reported that she was hearing voices for the last year telling her that something bad was going to happen to her family, which made her nervous. She kept the blinds closed at home. Dr. McCanless observed that Claimant "was pleasant and cooperative during the examination. Eye contact was good and she spoke clearly . . . She had a flat affect." He diagnosed Claimant with a psychotic disorder and noted that it could be secondary to depression. Claimant, however, denied being depressed. Dr. McCanless was concerned that Claimant's nervousness, paranoia feelings, and flat affect seemed more characteristic of a schizophrenic disorder. EX 5 at 45-46. Dr. McCanless was aware that Claimant "was on disability because of a back injury received at work [because she] was lifting something;" but made no specific comments associating the psychological problem with the work injury. EX 5 at 45-46.

On October 20, 1998, Dr. Sandor noted that Claimant was seeing other medical consultants "for non-industrial-related medical conditions." Dr. Sandor determined that she was medically disabled. He reiterated that an independent medical examination be held off until after Claimant's condition has stabilized. EX 5 at 47.

On October 26, 1998, Dr. McCanless observed that Claimant was still having auditory hallucinations and a flat affect. She was offered psychiatric hospitalization but refused. Claimant also refused MRI or CT scans because she has to pay half of the cost. Dr. McCanless noted that Claimant was "pleasant and cooperative during the examination, but seemed to be staring off into space and would talk in a low, kind of monotone voice . . . She also appears to have paranoid delusions and feelings that God is protecting her." Claimant was diagnosed with "psychotic disorder not otherwise unspecified." Dr. McCanless noted that the disorder had "no obvious organic cause . . . possibly this could be a psychotic depression except she continues to deny being depressed." There was no discussion about pain from Claimant's work injury. EX 5 at 48.

On October 28, 1998, Employer terminated Claimant for abandonment of position. EX 6 at 94.

On November 10, 1998, Claimant told Dr. McCanless that the voices were much less than before, and that she was not as fearful and was able to keep her blinds all the way open. Claimant reported no longer feeling that something bad was going to happen to her or her family. Claimant also commented that she was experiencing less pain and was not as worried about it. Dr. McCanless described Claimant again as "pleasant and cooperative during the exam. Eye contact was good and she spoke clearly. Her mood seems to be euthymic. Her range of affect is better than before although I would not describe it as broad yet. There still seems to be a little bit of flattening of her affect." EX 5 at 49.

On December 10, 1998, Dr. McCanless noted that Claimant was doing better and the voices were much less than before, except that she still had a somewhat subdued affect. Claimant described that the pain in her back had not calmed down much. She walked "somewhat slowly," and Dr. McCanless noted that "she mostly complains about physical pain." EX 5 at 50. Claimant remembered that Dr. McCanless told her that her problem was not a psychological one but a physical one. EX 12 at 181.

On January 19, 1999, Claimant filed a claim for workers' compensation, alleging cumulative trauma injury to her low back, hip, and arm through her last days of employment in July 1998. EX 3 at 7.

On May 11, 1999, Claimant saw Dr. K. Luke, a clinical psychiatrist, and told him that Dr. McCanless advised her that she no longer needed to return for a checkup unless she felt the need to. Dr. Luke opined that he did not feel that "patient meets the criteria for a major depressive episode." He further believed at least some of her presentation is culturally appropriate. Dr. Luke wrote that in his opinion no psychological impairment seemed to be involved in the patient's daily living activities and ability to relate. EX 14 at 250-52; EX 15 at 304. Dr. Luke further opined that Claimant was "fully competent," and diagnosed her with a possible adjustment disorder with depressed mood. EX 14 at 251-52.

On September 1, 1999, Claimant saw Dr. Gabriel Ma, an orthopedic surgeon, for an independent medical evaluation on instruction from Employer. Dr. Ma noted a difficult time taking a history from Claimant as she "appeared very depressed" and was neither cooperative nor uncooperative. Dr. Ma observed that Claimant had a "flat affect" and was "nervous." Dr. Ma stated in his report,

> On palpation of her neck, I did not detect any specific trigger points and I did not find any taut muscles or spasm between her shoulder blades. She complained subjectively of pain radiating down the entire right upper extremity, but I was not able to find any specific distribution of the sensory dermatomal distribution. On testing her motor power, I was not able to obtain any response and probably a failure [sic.] to try, because she expressed to me that she was not able to move her right upper extremity, because of pain and numbness . . . on raising the right shoulder she absolutely refused to abduct and elevate beyond 80 degrees. Using the JARMA dynamometer testing of the hand grip, the right hand rip was 0, because she was no [sic.] responding to command, and registered 40 on the left hand grip.

EX 4 at 14.

He also stated:

> On range of motion tests of her lumbarsacral spine again, I found it very difficult and unreliable in recording. She was able to forward flex to not more than 10 degrees and backward extension not more than 5 degrees. Although she did not complain of pain, she did not carry through the range of motion. . . . Neurological examination of both lower extremities again revealed that she complained of

> numbness and weakness of the entire left lower extremity, but failed to respond to commands in carrying through the examination.

EX 4 at 15. No atrophies were measured on Claimant's forearms, mid-arms, calves, or thighs. EX 4 at 14-15. Dr. Ma concluded that while Claimant has recovered from the orthopedic injuries, she would likely continue to be disabled due to conditions described by Dr. McCanless. He recommended more psychiatric treatment and evaluation for depression and hallucinations. EX 4 at 16-18.

On November 30, 1999, Claimant saw Dr. Miura-Akamine. Claimant appeared very depressed with very flat affect. She also claimed that she tried the antidepressants prescribed but had limited relief. She did not follow up on some suggestions from the pain management program. Claimant seemed to be feeling better with a new medication, but expressed the desire to stop work "because of her persistent pain," saying she would "rather live with her discomfort." She did not want to pursue any surgical intervention. Dr. Miura-Akamine noted:

> "The Patient has been [to] multiple physicians including the pain management team, the industrial physician, her primary care and myself. She even has seen the neurosurgeon for further opinion with regards to her neck. I made it clear to her that a lot of conservative treatments have been tried and that there really is very little more that we can offer at this time, and much of what she needs to do is to increase her exercise program and help to control her depression. She is still reluctant to follow up with any kind of psychiatric help."

EX 5 at 53. Dr. Miura-Akamine's impression was that, in addition to her neck and low back pain, depression was "a heavy component and obstacle towards this patient's successful recovery." EX 5 at 51-53.

On February 18, 2000, an MRI of Claimant's lumbar spine showed "diffuse degenerative disc changes, most prominent at L5-SI where there is also a narrowing of the disc and generalized bulge of the disc margin . . . There is moderate to moderately severe narrowing of the transverse diameter of the thecal sac at L5-SI . . ." CX 1 at 38, 54; EX 5 at 54.

On May 10, 2000, Claimant went to see Dr. Bernard Robinson, a neurosurgeon, for a surgical opinion. Dr. Robinson examined Claimant and opined that she was in no apparent distress. He stated:

> "Her examination was characterized by a voluntary input deficit that could not be overcome by the examiner. She appeared to have discomfort in her left lower and upper extremities. She was unable to fully cooperate with instructions to resist maximally during muscle testing including upper and lower extremities. She was unable to raise her arms in abduction for testing of the deltoid muscles but was able to touch the back of her head with her left hand and not the right. There was gross giveaway weakness in both upper and lower extremities . . . There appeared to be tenderness indiscriminately at points of neurogenic implication as well as others where there were no nerves. There was no evidence of atrophy,

> fasciculation, clonus nor spasticity. The sensory examination was not attempted due to concerns about authenticity. The patient did not appear to have gross sensory deficits . . . The patient walked with a very slow deliberate gait."

EX 5 at 56.

Dr. Robinson reviewed Claimant's MRI scan and opined that it showed evidence of spondylolisthesis with associated narrowing of the L5-S1 neural foramina, and other discogenic disease. He assessed Claimant with degenerative disk and spine disease affecting the cervical and lumbar spine. He further suspected right C6 and left S1 radiculopathy related to respective disk and spine disease of the cervical and lumbar spine. Dr. Robinson further indicated that he cannot "rule out psychogenic magnification of organic pathology, based on current history, physical examination, and imaging studies." Dr. Robinson offered to perform a decompressive laminectomy, to which Claimant consented over more intrusive surgical procedures. EX 5 at 56-57. This procedure was denied by Employer as "not work-related." CX 1 at 45.

On August 16, 2000, a functional capacities evaluation was performed. The results showed "low validity criteria," which suggested "poor effort and voluntary sub-maximal effort." EX 15 at 300.

On August 29, 2000, Claimant went to Dr. Sandor and stated that she "realized her pain would never go away." She said, "It's tearing me apart," and that she was only interested at this point in obtaining total disability. Dr. Sandor noted that Claimant's affect was "depressed and angry. She is at times cheerful." Claimant represented that Dr. McCanless told her that her depression was due to her physical illness and did not require treatment. EX 5 at 58. Dr. Sandor believed Claimant had a degenerative lumbosacral disc disease and degenerative cervical disc disease, stating that "both diagnoses could have been aggravated by work activities involving repetitive stooping and forceful activities of the upper extremities." CX 1 at 11. He considered Claimant's condition to be at maximum medical improvement, pending a determination that her psychological condition no longer required treatment, and he recommended a functional capacity evaluation to assist in rating and vocational rehabilitation. Claimant was instructed to have limited duties of "no scooping ice cream," no lifting or carrying over 25 pounds, and only occasional bending. EX 5 at 58-60; TR at 67.

On September 5, 2000, Dr. Smith, in an unsigned and unverified Kaiser medical record, is listed as a provider to Claimant. CX 1 at 4. This medical record does not identify Dr. Smith's specialty or indicate whether he ever examined Claimant. The record did list Claimant's purported problems to include, among other things, major depression, lumbar spine spinal stenosis, left S1 radiculopathy, cervical spondylosis with right C5-6 radiculopathy. *Id*. *See also* CX 1 at 13 and 46 for other unverified medical records.

On September 30, 2000, Dr. Sandor observed that Claimant was "tearful" and avoided eye contact. He noted that Claimant had glove stocking distribution hypesthesia to the entire left extremity. He assessed Claimant to be at maximum medical improvement with her degenerative disc disease of the lumbarsacral spine and of the cervical spine, but found that she was suffering

from an affective disorder "not related to work injury." Dr. Sandor encouraged Claimant to go back to Dr. McCanless, and he continued her earlier work limitations. EX 5 at 61-62.

On October 28, 2000, Dr. Sandor lifted the earlier work limits regarding squatting, kneeling, climbing, reaching above shoulders, and occasional lifting or carrying under 25 pounds. The only remaining restrictions were no carrying or lifting over 25 pounds, occasional bending, and "no scooping ice cream." EX 5 at 65.

On October 30, 2000, Dr. Sandor interpreted the functional capacity evaluation that was performed on October 16, 2000. He noted, "Evaluator felt that the function evaluation was impaired by low validity criteria suggesting poor effort and voluntary sub-maximal effort." Taking this into consideration, Dr. Sandor chose not to use the 15 pound limitations based on Claimant's performance at functional evaluation, but rather changed back to his previous recommendations of "limiting lifting to 25 [pounds] occasionally; limiting bending to occasionally and avoiding ice-cream scooping," kneeling, and crawling. These restrictions were given "on a permanent basis as the condition has reached maximum medical improvement." CX 1 at 56; EX 5 at 66.

On December 7, 2000, an administrative law judge ("ALJ") from the Social Security Administration concluded that Claimant had "a severe impairment or combination of impairments but retain[ed] the residual functional capacity to return to the work she performed in the past." The ALJ also noted that "exams revealed few objective clinical signs to substantiate Claimant's varying complaints of pain and numbness." EX 15 at 307.

On January 13, 2001, Claimant returned for re-evaluation at Kaiser. Claimant stated that there was no change in her pain. Noting Dr. Sandor's earlier work limitations, Dr. Jon Scarpino recorded, "She is not working. She is not seeking work. She is not seeking reeducation. She states that she knows her body and she knows she is not even capable of working part-time." EX 5 at 67. Dr. Scarpino noted that Claimant had a flat affect, made minimal eye contact during the encounter, and gave only one word answers. Claimant volunteered no information and seemed "somewhat depressed" to the physician. All of her motions were slow. Dr. Scarpino's impression was that Claimant had chronic pain syndrome. He indicated that no further active treatment was planned at that time, and opined that Claimant's prognosis for return to her previous functional level as "poor." CX 1 at 62; EX 5 at 67.

On March 10, 2001, Claimant appeared to Dr. Sandor with "a flat to borderline tearful affect." EX 5 at 68. She denied feeling depressed and stated that she did not accept that diagnosis. She stated that she was interested in obtaining workers' compensation. Dr. Sandor felt that Claimant's chronic pain syndrome and her back problems with degenerative disc disease remained at a point of maximum medical improvement. However, he opined that Claimant suffered from an affective disorder not related to her work injury. He encouraged psychiatric follow up. EX 5 at 68-69.

In 2002, Claimant and her husband lost their home because of Claimant's loss of income and the added burden on her husband's income from her medical costs. Claimant and her husband moved in with their oldest daughter, her husband and their four children. The

daughter's family all lived in a two bedroom apartment in Ewa Beach, Hawaii. This resulted in Claimant and her husband having to sleep in the living room. CX 9 at 155, 157.

On September 10, 2002, Claimant began to see Dr. Gwendolyn Nishimura as her primary physician at Kaiser for problems unrelated to this claim. TR at 37-38. Dr. Nishimura is a "gate keeper" physician who refers patients needing specialty referrals after an initial evaluation of what services are required for their care. TR at 36-37, 54, 72. Dr. Nishimura has no specialty training or expertise in treatment of spinal injuries or in psychology or psychiatry. TR at 55-56. The only time that Dr. Nishimra saw Claimant for her neck and back problems was on December 9, 2002. TR at 38, 56. Dr. Nishimura did refer Claimant to a neurosurgeon and physiatrist, but did not refer her to a psychologist or psychiatrist. TR at 72.

Dr. Nishimura testified at trial that Claimant had a depressed affect, and agreed with Dr. Loo's January 2005 diagnosis that Claimant suffers from a chronic pain disorder. She stated, "It would not be unusual, based on the chronicity of her problems and the difficulties that caused in her life, for someone to become both depressed and also simply be in a chronic pain state . . . everyone agrees that Ms. Ryan has pain . . . It's a problem with really being able to treat her and improve her condition. And that's why it's, in essence, chronic pain disorder." TR at 50. Dr. Nishimura expressed the opinion that Claimant was a credible patient but had not reviewed any of Dr. McCanless' psychiatric records. TR at 46, 64. In addition, Dr. Nishimura was unable to opine as to the cause of Claimant's herniated disk. TR at 72.

On February 14, 2003, a lumbar spine MRI was taken of Claimant. Just as Claimant's lumbar spine MRI of February 18, 2000, this MRI demonstrated a broad based disc herniation at the L5-S1 level, causing bilateral foraminal stenosis that was mild on the right side and moderately pronounced on the left. CX 1 at 53.

Dr Nishimura referred Claimant to see Dr. Won-Yee Cheng, a physiatrist at Kaiser. Dr. Cheng explained that physiatry is a combination of physical medicine and rehabilitation, and that her job "was to try to get people back to work." CX 9 at 5, 20. Dr. Cheng saw Claimant three times.

On April 15, 2003, Claimant related to Dr. Cheng that she injured herself while "lift[ing] a heavy oxygen tank" and noted "immediate low back and neck pain [that] radiated down her left leg, as well as in her right arm." CX 1 at 43. Dr. Cheng noted that "her pain remains severe despite extensive physical therapy and multiple medications." Dr. Cheng recorded that Claimant "can be upright from anywhere from half an hour to an hour, but notes dramatic aggravation in her neck and back pain, especially her left greater than right leg pain, associated with numbness posteriorly . . . Unfortunately, she has some difficulty in tolerating the Neurontin because of dyspepsia and some mild nausea and excessive bloating." CX 1 at 43. On the same day, Dr. Cheng wrote to Ms. Sakamoto, a Disability Claims Examiner, expressing her view that "given [Claimant's] continued symptoms of severe pain, failure with rehabilitation, and demonstrable abnormality on MRI, I feel that she is unable to participate in gainful employment. I feel that her disability is permanent." CX 1 at 44.

Dr. Cheng explained that Claimant's February 14, 2003 lumbar spine MRI was consistent with Claimant's symptoms of greater pain on the left side of her body. CX 9 at 14. Dr. Cheng believed that Claimant's physical complaints are "consistent" with her alleged work injury in November 1996 because of the mechanism of the injury and the complaints reported, and because the November 1996 date coincides with Claimant's history of seeking medical treatment. CX 9 at 14-15. Dr. Cheng also opined that Claimant's duties at the ice cream shop could "clearly aggravate her back pain and radicular symptoms into [her] arms," and that bending over to scoop ice cream hurt Claimant's L5-SI disk slippage. CX 9 at 14, 16-17. She further opined that Claimant probably suffers from a chronic pain disorder, explaining that prolonged pain "brings in other psychological stressors such as depression, anxiety, or stress that compound and make pain and impairment somewhat beyond what would be expected from the physical injury/abnormality." CX 9 at 8. Dr. Cheng stated that she was not surprised that Claimant did not immediately seek medical help upon injury, because in her experience, Claimant's culture group often is hesitant to seek immediate medical attention related to these types of injuries, and that they tend to feel uncomfortable with the medical profession. CX 9 at 18.

Sometime during the second half of 2003, Claimant took a family vacation with her husband and four grandchildren aged 6 to 13 to San Francisco for about one week. They went to the shopping centers and did typical tourist activities, such as sight-seeing and eating. Claimant added that she walked leaning on a cart. TR at 187-89.

On February 11, 2004, Claimant told Dr. Cheng that she continued to have pain at a level of 8 out of 10. She could not tolerate higher doses of her current medication or any other medication because "they all seem to upset her stomach." She related that she was still only able to tolerate up to 60 minutes upright at a time, after which she needed to lie down. She described that she could walk for about 20 minutes at a time. Claimant presented Dr. Cheng with paperwork from the U.S. Department of Labor and asked Dr. Cheng to fill her work limitation as the Department of Labor wanted to enroll her in a vocational rehabilitation program. CX 1 at 6. Dr. Cheng stated on the work capacity evaluation that Claimant "cannot tolerate being upright for more than 60 minutes at a time, after which she needs to lie down." Dr. Cheng also stated that Claimant can work at most four hours a day with 15 minute rest in repose every hour. CX 1 at 42.

On July 6, 2004, Employer filed a Notice of Controversion to Claimant's alleged cumulative injury sustained while working at Baskin Robbins. EX 2 at 5.

On August 3, 2004, Dr. Cheng noted that Claimant was "still resistant to taking any other types of medication, as they all tend of upset her stomach." Claimant continued to complain of severe pain on a level of 7 out of 10. CX 1 at 1. Dr. Cheng observed that she was not in acute distress, but she was "in clear discomfort as she sat in the chair. She was constantly weight-shifting." Dr. Cheng's assessment was "chronic neck and low back pain with radicular symptoms," "broad-based disk herniation of the L5-SI associated with spondylolisthesis and moderately pronounced facet hypertrophy causing bilateral foraminal stenosis." CX 1 at 1. Dr. Cheng reiterated that Claimant was previously seen in the clinic and "felt to be maximally medically improved and permanently and totally disabled." *Id*.

Dr. Gabriel Ma evaluated Claimant again on November 10, 2004. He noted that it was difficult to get any information from Claimant as she appeared "very depressed" and generally apathetic. CX 3 at 99. Dr. Ma's diagnosis was that Claimant has "minor cervical, low back, and shoulder strains with reactional hysteria and depression resulting in total disability," as well as a degenerative L5-S1 disk and degenerative spondylothesis. CX 3 at 102. In his report, Dr. Ma stated, "Patient effort was poor, but I did not detect any motor deficit of the lower extremities." EX 4 at 20. Again, no atrophying was measured on either Claimant's arms or legs. EX 4 at 20. Dr. Ma expressed the opinion that, with exception of personality problems, Claimant's physical problems - her low back, shoulder, and cervical spine - are all "minor" or "essentially normal looking." CX 3 at 102-03. Dr. Ma stated in his deposition that, "she had just a straightforward degenerative L5-S1 disk, and all her other symptoms are really totally nonspecific. She had numbness of the left leg, numbness of the right leg. The numbness actually affected the entire lower extremity which really doesn't go along with any specific pathology." CX 3 at 105. Dr. Ma believed that what was really causing Claimant's disability was her "personality," stating that associative depression is very common with longstanding back problems. CX 3 at 102-03. Dr. Ma highly recommended psychiatric help for Claimant, believing that the psychological issue was related to the alleged injuries at work. CX 3 at 122.

Otherwise, based on objective findings, Dr. Ma was not able to find "any correlation between the examination and . . . any pathological condition to fit into her symptoms." CX 3 at 129. He did not feel that Claimant needed further orthopedic care. Dr. Ma did not know if Claimant had reached the point of maximum medical improvement because of her continual complaints of pain. CX 3 at 128.

On November 10, 2004, in a letter to Employer, Dr. Ma opined that "patient was not capable of returning to customary job duties." He stated that "whether this is an industrial or personal basis would be better determined by an evaluation by a psychologist or psychiatrist." Dr. Ma believed that Claimant would benefit from psychological treatment. CX 9 at 161.

In November 2004, Dr. Cheng believed Claimant had completed all treated provided to her and that she appeared to be in stable condition. As a result, Dr. Cheng tried to help Claimant apply for Social Security disability benefits. CX 9 at 19; CX 10. Dr. Cheng believed it was unlikely that Claimant would return to work because Claimant had not worked in six years by that time, and because Claimant could not sit upright for more than 60 minutes." CX 9 at 20.

On November 11, 2004, Dr. Scarpino, of Kaiser's Occupational Health Department, issued an interim industrial report, which stated that Claimant had no change in pain, had a flat affect, made minimal eye contact, gave one word answers, volunteered no information, and seemed "somewhat depressed." CX 9 at 161. Claimant stated to Dr. Scarpino that she knows her body and she knows that she is not even capable of working part-time. EX 15 at 301.

On December 20, 2004, Claimant was interviewed by Eileen Figueroa, a National Certified Rehabilitation Counselor and registered and licensed professional vocational rehabilitation specialist. TR at 199-204; EX 11; EX 13 at 216. Ms. Figueroa spent about three hours with Claimant to gain information about her age, education, and work history in order to

perform a labor market survey. TR at 199-200. Ms. Figueroa observed Claimant "walking very slowly, using a cane, and kind of leaning over when she walked." However, Claimant was able to sit through the entire meeting. TR at 200. I also observed Claimant at hearing sitting approximately one and one-half hours without standing or expressing pain symptoms during the hearing.

Ms. Figueroa reviewed reports by Dr. Sandor, Dr. Ma, and Dr. Cheng, but she was told to base her labor market survey on Dr. Sandor's restrictions in the October 2000 functional capacities evaluation. TR at 201-02, 217-218, 229-30. Ms. Figueroa was not aware of any mental health problems that Claimant had or was treated for. TR at 227. Ms. Figueroa believed Claimant would be capable of performing sedentary or semi-sedentary work. Ms. Figueroa further opined that Claimant has wage-earning capacity in the positions for which she prepared a Labor Market Surveys and Job Analysis, but that she had concerns whether Claimant would be hired because of her observations of Claimant – specifically, the way Claimant moved about and changed positions. TR at 204; EX 13 at 222-23. Ms. Figueroa conceded that if she was to do her labor market evaluation based on a different set of restrictions prescribed by different physicians, her results would be different. TR at 223.

Upon completion of the interview, Ms. Figueroa walked Claimant to the parking lot where her husband was waiting for her. Ms. Figueroa noted that, although Claimant walked very slowly and explained that she had to "rock back and forth to find the right position to be able to walk," when Claimant leaned on Ms. Figueroa's arm, she was not exerting any pressure and was not using Ms. Figueroa for any support. TR at 200-01; EX 13 at 222. Claimant also did not need any help in getting into the vehicle, which was a mini-van that was "high off the ground." TR at 201; EX 13 at 223. Ms. Figueroa stated, "I was struck by the inconsistency of her outward display and verbal account of inability and the lack of actual support necessary." EX 13 at 223.

Ms. Figueroa opined that Claimant was capable of working 18 part-time and 25 full-time positions with salaries ranging from $6.50 to $14.90 per hour (or $130 to $298 per week) for part-time (20 hrs per week) and $7.00 to $14.90 per hour (or $280 to $596 per week) for full-time (40 hours per week). EX 13 at 231. Ms. Figueroa identified seven full-time and part-time job openings from January 7-10, 2005 that were within Claimant's experience of being a cashier, customer service, and food preparation and within her sedentary/light work limitations of occasional lifting up to 25 pounds, occasional bending, and no ice cream scooping, kneeling, crawling, or repetitive use of right upper extremity. TR at 207; EX 13 at 220-21, 231. These were also positions that would allow Claimant to sit and stand as necessary. Ms. Figueroa further opined that the open positions were realistic for Claimant given her age, education, and work experience combined with Dr. Sandor's October 2000 permanent physical restrictions because all of the positions involved sedentary/light work and were all pre-screened. TR at 211.

Specifically, the open positions included a counter attendant position at Dole Plantation at a rate of pay of $6.50 per hour for skills related to food service and cash handling on a part-time basis; an inventory taker position at Regis Inventory Specialists at an entry rate of pay of $7.75 per hour for skills related to having a telephone and transportation on either a full-time or a part-time basis; an appointment setter position at World Talent, Inc. at a rate of pay of $7.00 per hour for skills related to telephone communication with training provided on a part-time basis; a

table server position at Plaza At Punchbowl, a senior citizen independent living place, at an entry rate of pay of $7.25 per hour for skills that come from training on a part-time basis; a telemarketer position at Ad-Ventures Hawaii LLC at a rate of pay of $8.00 per hour for skills learned through training on a part-time basis; a kitchen and counter help position at Meg's Drive-Inn at an entry rate of pay of $7.00 to $8.00 per hour for skills related to Claimant's prior experience on a full-time basis; and a teller position at Hawaii State Federal Credit Union at a rate of pay of $8.69 to $14.90 per hour for skills related to Claimant's prior experience on either a full-time or a part-time basis. TR at 206-11; EX 13 at 231-36.

On January 23, 2005, Claimant underwent a psychological evaluation by Dr. Chalsa M. Loo, a licensed clinical psychologist. The evaluation took place over four sessions for a total of four hours. Dr. Loo reported that the interview was "difficult" because of Claimant's concerted energy to deal with the apparent discomfort she was experiencing, as the evaluation was "repeatedly interrupted" while Claimant had to "continually strain and shift physically apparently to find some less uncomfortable position," and because Claimant's "non-elaboration of verbal disclosure." CX 9 at 154-55. Dr. Loo reviewed Claimant's medical records in detail, but her review did not include Dr. McCanless' reports and she apparently was not aware of Claimant's history of auditory hallucination. CX 9 at 157-61.

Claimant underwent three tests: the Beck Depression Inventory, the Traumatic Life Events Questionnaire, and the Minnesota Multiphasic Personality Inventory (MMPI-2). CX 9 at 156. Claimant's MMPI-2 results are consistent with "persons who are excessively concerned about vague physical symptoms. These complaints . . . may be related to actual organic causes (e.g. work injuries). Stress may be expressed in specific physical symptoms or may magnify these symptoms." Persons with Claimant's MMPI-2 profile "often exhibit a general sadness and depressed mood about life or themselves, with feelings of pessimism, depression, and hopelessness." Dr. Loo stated, "She worries about her health a good deal of the time. Persons with this code type usually have little motivation for any type of psychological intervention, preferring to focus on her physical symptoms rather than on any form of psychological process." CX 9 at 164.

From these tests and conversing with Claimant, Dr. Loo diagnosed that Claimant suffers from a chronic pain disorder, a depressive disorder, a mood disorder, a sexual aversion disorder, and an anxiety disorder. CX 9 at 166-67. Regarding the pain disorder, Dr. Loo stated, "pain is the predominant focus of the clinical presentation, psychological factors (or depression and anxiety) are judged to play a role in the severity, exacerbation, or maintenance of the pain, the pain does not appear to be feigned as in malingering, and the pain causes significant distress or impairment as indicated by inability to work, frequent use of the health care system, substantial use of medication, relational problems such as disruption of marital sex life and disruption of normal lifestyle (loss of home and loss of control in family constellation)." CX 9 at 166. Dr. Loo found all these disorders to be work related, either directly or secondarily, through a loss of earning capacity and later loss of her home. CX 9 at 166-67. Dr. Loo noted that Claimant's psychological distress was reduced in early 2004 because she was listening to Christian radio programs and following God's teaching to "not be anxious about anything." CX 9 at 163.

On January 24 and 25, 2005, Claimant applied for four of the seven positions listed by Ms. Figueroa in part II of her labor market survey. TR at 208. Although Claimant testified that she went to six of the seven positions and the seventh one told her the position has been filled, Ms. Figueroa, on the other hand, found that Claimant had only applied to four of the seven positions. TR at 156. The positions Claimant applied for included the positions with Dole Plantation, World Talent, Inc., Plaza at Punchbowl, and Hawaii State Federal Credit Union. TR at 208-11. Claimant was waiting to hear responses to some of them at the time of hearing. *Id* Ms. Figueroa opined that Claimant did not get the positions at Plaza at Punchbowl or Meg's Drive-In as the employers in each case did not think Claimant could perform the work based on seeing her slow walking. TR at 209-10. At the credit union position, the employer stated that they are not considering Claimant because she did not mention her previous cash handling or retail sales experience. The one position that Claimant stated had already filled their opening told Ms. Figueroa that they would be calling their applicants the following week. TR at 209-211.

On February 15, 2005, Employer sent Claimant for a psychiatric evaluation with Dr. Boyd J. Slomoff. The interview was completed on February 25, 2005. EX 15 at 299. Dr. Slomoff interviewed Claimant, examined prior medical histories and records, and administered the Zung Self-Rating Depression Scale, a SCL-90-R symptom checklist, the Sleep History Questionnaire, the Beck Depression Inventory, the Hamilton Anxiety Rating Scale, the Quality of Life Inventory, and the Millon Clinical Multiaxial Inventory-III (MCMI-III). EX 15 at 316-319. Claimant denied being depressed to Dr. Slomoff, saying instead, "it's the pain." EX 15 at 321. Dr. Slomoff observed that Claimant "obtained greater psychological comfort" as their meeting continued even while experiencing pain, and that they were able to "talk at length as she elaborated details of growing up in Western Samoa and other life experiences . . . Her constricted range of affect expands when discussing matters of interest to her." EX 15 at 327.

The MCMI-III results indicate that Claimant's personality configuration was composed of schizoid personality traits, paranoid personality features, and avoidant personality features. EX 15 at 320. Claimant's profile suggested that:

> "she deal with her anxiety and mistrust of others by muting her feelings . . . Both her fears and her low self-esteem may be reflected in shy and withdrawn behavior . . . this woman is disposed to believe that she is both unattractive and unappealing to others. She may have chosen the path of social withdrawal and isolation to protect herself . . . this woman may become excessively self-absorbed, unassertive, dysthymic, and shy. Quite possibly, the ordinary responsibilities of give and take of everyday social and family life may be felt to be more than she can bare."

EX 15 at 326. Dr. Slomoff opined that such "developmental preinjury personal traits . . . color her presentation and may be what various healthcare providers have noted." *Id.* Dr. Slomoff believed that Claimant has a somatoform or psychic-originated presentation, which is manifested as a pain disorder, and that her other symptoms of anxiety and depression do not manifest clinically or meet criteria for disorders. *Id.*

Dr. Slomoff agreed with Dr. McCanless and Dr. Sandor that Claimant's psychological disorder, if any, is unrelated to the industrial injuries associated with this claim. He states that more information is needed to reach a definite result, but that "based on the evidence currently available, an association between Ms. Ryan's psychological state and the work injuries is a matter of unsubstantiated conjecture, [with no] apparent connection other than a coincident temporal one." EX 15 at 327.

Dr. Slomoff believes that Claimant's psychiatric condition "appears substantially stationary and permanent" at the time of evaluation. He believes it is plausible that Claimant's condition will improve after she and her husband retire to Western Samoa in the future. EX 15 at 328. Dr. Slomoff believes Claimant is unlikely to return to gainful employment given her presentation, physical carriage, and ambulation. Further, Dr. Slomoff believes Claimant will "thwart any actual attempt to employment, as she does not consider this possibility within her worldview," but that she "might find some productive employment within her physical capacity limitations if in a setting agreeable to her." EX 15 at 328. Dr. Slomoff also expressed the opinion that Claimant may be capable of sedentary employment with minimal face-to-face social interaction, such as the telemarketer and appointment setter positions identified by Ms. Figueroa. EX 15 at 329. In his opinion, Claimant's symptom complex is not amenable to insight or typical pain management center techniques. EX 15 at 329.

Claimant generally states that after the injury, she now cannot drive to church anymore, nor can she read and clean around the house as she had done before. Her injury has kept her from bending at the waist or the neck. Her right arm cannot grip and she can lift less than 10 pounds. She can only walk 100 feet and sit for five minutes before her pain increases. Her physical discomfort wakes her up at night. She cannot kneel or climb, and her concentration and memory have worsened since the injury. TR at 149-53.

DISCUSSION

Credibility

The following conclusions of law are based on my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon the analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In arriving at a decision in this matter, I am entitled to determine the credibility of witnesses, to weigh the evidence, and to draw my own inferences from it; furthermore, I am not bound to accept the opinion or theory of any particular medical expert. *See Banks v. Chicago Grain Trimmers Assoc., Inc.,* 390 U.S. 459, 467, *reh'g denied,* 391 U.S. 929 (1968); *Todd v. Shipyards Corp. v. Donovan,* 300 F.2d 741, 742 (5th Cir. 1962); *Scott v. Tug Mate, Inc.,* 22 BRBS 164, 165 (1989); *Hite v. Dresser Guiberson Pumping, 22* BRBS 87, 91 (1989); *Avondale Shipyards, Inc. v. Kennel,* 914 F.2d 88, 91 (5th Cir. 1988).

Claimant

Claimant repeatedly complained of debilitating chronic pain throughout the past nine years since she was first injured. However, her complaints are not supported by objective

medical findings. For example, as early as June 5, 1998, while Claimant complained that her pain "was getting worse," her radiologist remarked that Claimant had only *"very early* foraminal encroachment" that was *"most marked* at C4-5 on the right *of doubtful significance*," and that her "other disc spaces and vertebral body heights *appear well maintained* and posterior elements are *intact*." CX 1 at 39; EX 5 at 31(emphasis added). Again, on July 16, 1998, while Claimant complained to her treating physician, Dr. Sandor, that she had constant pain on a level of 6-7 out of 10, Dr. Sandor noted that her neck revealed "*exaggerated tenderness to light palpation*;" that the "range of motion ... is within *normal limits*;" and "there is *no palpable muscle spasm*," "*no motor abnormality*," and "*no muscular wastings*." EX 5 at 38-39 (emphasis added). On his September 1, 1999, examination report, Dr. Ma stated, "On palpation of her neck, I did not detect any specific trigger points and I did not find any taut muscles or spasms between her shoulder blades. She complained subjectively of pain radiating down the entire right upper extremity, but I was not able to find any specific distribution of the sensory dermatomal distribution." EX 4 at 4. On his second evaluation of Claimant on November 10, 2004, he opined that Claimant's physiological problems -- her low back, shoulder, and cervical spine -- are all "minor" or "essentially normal looking." CX 3 at 102-03.

Secondly, on more than one occasion, Claimant has been observed to physically move about freely and unhindered by her alleged pain symptoms. For example, on September 9, 1998, while representing to Dr. McKoy of the Pain Clinic that she had neck and arm pain at a level of 10 out of 10, Dr. McKoy observed that she had no difficulty walking or getting onto the exam table. EX 5 at 41-43. Sometime in 2003, Claimant took a family vacation with her husband and four grandchildren, aged from 6 to 13 years old at the time, to San Francisco for about one week. During this trip, Claimant and her family walked around, dined, and participated in customary tourist activities, such as sight-seeing. TR at 187-89. This strikes me as especially poignant evidence in contrast to Claimant's representation of herself being completely debilitated by her pain and depression at hearing and to Dr. Cheng around this same time period. *See,e.g.,* TR at 149-53; CX 1 at 44.

On December 20, 2004, when Ms. Figueroa, the vocational rehabilitation counselor, interviewed Claimant, she observed that Claimant was able to sit through the entire meeting. She also took note of the fact that though Claimant leaned on her arm when they left the office, Claimant was not exerting any pressure and was not using Ms. Figueroa for any support. Ms. Figueroa further noted that Claimant got into her husband's vehicle, which was "high off the ground," without any need for assistance. TR at 201; EX 13 at 223. Furthermore, Claimant routinely drove her daughter's car, dropped off her grandchildren at school, and drove 30 miles to her attorney's office with no apparent mental or physical problems. TR at 192-93; EX 13 at 223. Also, Claimant's alleged depression seemed to miraculously disappear completely on July 30, 1998 when she thought that she has been granted disability. See EX 5 at 40.

On the day of the trial, I also observed that Claimant began the hearing staring off at a wall and seeming completely indifferent, but later when she was required by her counsel to testify she had no signs of mental difficulty hearing questions or responding and no physical difficulty sitting through the entire hearing. Claimant sat in her chair at the hearing from 9 a.m. until a break at 10:35 a.m. and from 10:45 a.m. to 11:40 a.m., sitting up straight at one time with clear interest when testimony was unfavorable to her case. Claimant did not stand up for the

apparent reason of relieving pain or discomfort from sitting and did not appear to be in pain while seated.

Thirdly, on more than one occasion, different physicians have made note of Claimant's deliberately reduced effort on physical examinations. In Dr. Ma's September 1, 1999 report, he described, "I was not able to obtain any response and probably a failure [sic] to try, because she expressed to me that she was not able to move her right upper extremity ... On raising the right shoulder she absolutely refused to abduct and elevate beyond 80 degrees. Using the JARMA dynamometer testing of the hand grip, the right hand grip was 0, because she was no [sic] responding to command ... On range of motion tests ... [a]lthough she did not complain of pain, she did not carry through the range of motion." EX 4 at 14-15. On May 10, 2000, Claimant went to Dr. Robinson, a neurosurgeon, for a surgical opinion regarding her persistent pain. Dr. Robinson remarked, "[Claimant's] examination was characterized by a voluntary input deficit that could not be overcome by the examiner.... She was unable to fully cooperate with instructions to resist maximally during muscle testing including upper and lower extremities. She was unable to raise her arms in abduction for testing of the deltoid muscles but was able to touch the back of her head with her left hand and not the right. There was gross giveaway weakness in both upper and lower extremities." EX 5 at 56. Dr. Robinson also chose not to conduct a sensory examination "due to concerns about authenticity." He concluded that he "cannot rule out psychogenic magnification of organic pathology, based on current history, physical examination, and imaging studies." EX 5 at 56-57.

Finally, I find that Claimant was not credible in her search for alternative employment in late January 2005. In particular, her failure to reference her cash handling skills and prior experience in her application for a teller position with a federal credit union is viewed as an intentional omission of key skills. Moreover, I find that her lack of effort in her physical examinations referenced above also suggests that Claimant's lack of effort in walking at the interviews at Plaza at Punchbowl and Meg's Drive-In were intentional, especially in contrast to her ability to walk and sight-see during her vacation with her young grandchildren to San Francisco in 2003.

Based on the above discussion, I find that Claimant's testimony is of questionable veracity, and accordingly, I do not give much weight to her testimony, her subjective complaints over the years, or her efforts to apply for alternative work positions.

Dr. Nishimura and Dr. Cheng

Because Claimant has not presented herself as credible, the opinions of medical experts who accepted Claimant's subjective complaints without question or confirming objective testing results should therefore be rejected as based upon an unreliable foundation. Dr. Nishimura and Dr. Cheng's medical opinions of Claimant are rejected in that they both accepted Claimant's subjective representation of her condition uncritically. Both these physicians did not become involved in providing for Claimant's health care until September 2002, which was six years after her initial injury. TR at 37; Cheng DP at 5. As a result, they did not conduct a first-hand evaluation of Claimant's condition or the cause of her problems. For example, Claimant represented to Dr. Cheng that she injured herself while "lift[ing] a heavy oxygen tank" and noted

"immediate low back and neck pain" which radiated down to her left leg and right arm. CX 1 at 43. That is an inaccurate account of how Claimant's back and leg pain started. Based on Claimant's account that she could not remain in a upright position for more than one hour, Dr. Cheng felt that she would not be able to return to gainful employment, and therefore, tried to help Claimant to apply for disability benefits. CX 1 at 44. These physicians' indiscriminate acceptance of Claimant's subjective accounts subjects their opinions to criticism along with Claimant's own testimony.

Furthermore, Dr. Nishimura only met once with Claimant about her back problems and not as an orthopedic specialist as her role for Kaiser was that of "gate-keeper." *See* TR at 55-72.

Finally, Dr. Cheng's diagnosis of chronic pain disorder is rejected, because she never diagnosed such a disorder in her report and first referenced it at her deposition. CX 10 at 34. This diagnosis is also rejected because while Dr. Cheng frequently makes psychiatric referrals for chronic pain disorder patients, she made no such referral in this case. CX 10 at 9, 38.

Dr. McCanless and Dr. Sandor

On the other hand, I find Dr. Sandor's opinion highly credible. Dr. Sandor has been one of Claimant's ongoing primary treating physicians from July 1998 to March 2001. Not only has he consistently monitored Claimant's condition, his opinion also carries additional weight because he is a physician in Kaiser's Occupational Medicine Department, which makes him especially knowledgeable in work-related injuries. CX I at 21; EX 5 at 68. Dr. Sandor's opinion also showed that he only accepted Claimant's subjective complaints after weighing the different objective findings. CX 1 at 11, 21.

Dr. McCanless' opinion is also of particular weight because he is the first psychiatrist to evaluate Claimant for her psychological condition. As a treating physician, Dr. McCanless, unlike Dr. Loo and Dr. Slomoff, did not conduct his diagnosis of Claimant in preparation of litigation. Dr. McCanless found Claimant to be suffering from a psychotic disorder separate and distinct from any work-related physical or mental conditions. *See* EX 5 at 48.

There are two physical injuries/claims, the November 1996 specific injury and the July 1998 cumulative injury, and one psychological claim that will be analyzed separately.

Alleged Specific Trauma Injury of November 3, 1996

Claimant alleges that a specific trauma injury occurred at work on November 3, 1996 and that she is entitled to compensation and medical benefits. Employer controverts that such an injury ever occurred, and, in the alternative, asserts that it was not timely noticed or timely filed pursuant to the Act.

1. Prima Facie Case

To establish a *prima facie* case under the Act, a claimant must show that he or she has suffered some harm or pain, and that an accident occurred or that working conditions exist which

could have caused the harm. *Murphy v. SCA/Shayne Brothers,* 7 BRBS 309 (1977); *Kelaita v. Triple A Mach. Shop,* 13 BRBS 326 (1981). The claimant must establish the existence of an injury without the aid of the statutory presumptions of section 20(a) of the Act by a preponderance of evidence. *Devine v. Atlantic Container Lines, G.I.E., 25* BRBS 15 (1990); *Dir. v. Greenwich Collieries,* 512 U.S. 267 (1994).

a. Claimant's Section 20(a) Presumption of Work Injury on November 3, 1996

Claimant alleges that on November 3, 1996[3], sometime after the morning hour rush, she injured herself while lifting a 50 pound carbon dioxide tank to fit into the soda fountain machine. Claimant alleges that she pulled some muscles in her arm and neck. EX 12 at 152; TR at 124. She testified that she told her supervisor, Evalani Newbourg, of this injury on the day it occurred, and was told to "take it easy." TR at 125-26.

Employer, on the other hand, questions Claimant's testimony in this regard, pointing to (1) a lack of evidence substantiating Claimant's testimony that she reported the incident immediately thereafter; (2) the fact that when Claimant filed the Notice of Injury to Employer 19 months later, she gave the date of the injury as "Nov. - 1996" and described the cause of injury as "lifting, moving and throwing heavy rubbish bags;" RX 7 at 95; (3) the fact that when Claimant eventually sought medical treatment February 7, 1997, she reported that her arm pain was present for only "one week" and denied any "recent trauma;" RX 5 at 23-24; and (4) Claimant's ongoing denial of specific incidents causing her symptoms in July and September 1998. RX 5 at 38, 41.

Generally, Claimant's credibility presents a significant question throughout this case. However, on the question of whether a specific injury ever occurred in November 1996, I find Claimant to have carried her burden of proof by a preponderance of evidence. First, the mechanics of her injury - lifting a heavy object and pulling some muscles - are commonplace enough that it is reasonable for Claimant to not immediately seek medical attention or even understand it as a "trauma" event. At least one physician, Dr. Cheng, opines that Claimant "may not understand that lifting can be traumatic" and that this reluctance to seek medical attention initially is consistent with Claimant's culture group and the nature of this injury. Cheng DP at 18. Secondly, while Claimant stated that she had right arm pain for "one week" on her first doctor's visit on February 7, 1997, by Claimant's third visit on March 18, 1997, she was reporting a "four month history of neck and right arm pain," which related the injury back to November 1996. EX 5 at 23-24; CX 1 at 41. Claimant's medical history also shows that prior to her alleged injury in November 1996, she had no treatment or complaints to the neck and back area. EX 5 at 38. In fact, the records consistently show that prior to the alleged injuries at issue in this case, Claimant's past medical history was "rather unremarkable." EX 5 at 27. Finally, a large majority of her medical records from 1997-2000 reference the date of initial injury as November 1, 1996 and Dr. Sandor, her most frequent treating physician, lists her date of injury as November 1, 1996. *See* EX 5 at 40,44,47,58-68.

[3] Throughout the record, there are repeated references to November 1, 1996 as the date of the specific trauma injury. As Claimant clarifies in her deposition, she believes the injury actually happened on November 3, 1996. EX 12 at 152. In this opinion, all reference to the date of this injury will be noted as November 3, 1996 regardless of the date indicated on the respective exhibit.

As a result, Claimant has presented substantial evidence to warrant the section 20(a) presumption with respect to her November 3, 1996 work injury to her neck and back.

b. Employer Has Rebutted the Section 20(a) Presumption With Substantial Evidence

Employer first argues that the records as a whole show that Claimant did not suffer a compensable injury as Claimant's medical findings are all degenerative in nature. Employer argues that all allegations that Claimant's work on November 3, 1996 caused her to suffer an injury to her neck and back are based on her testimony, which should be disregarded for lack of credibility. ALJX 7 at 7.

An employer is not liable for compensation if the claimant's condition is due solely to the degenerative processes of aging. *See Haynes v. Rederi A/S Aladdin*, 362 F.2d 345 (5th Cir. 1966). However, if an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. *Independent Stevedore Co. v. O'Leary,* 357 F.2d 812 (9th Cir. 1966); *Rajotte v. General Dynamics Corp.,* 18 BRBS 85 (1986).

Here, between Claimant's November 3, 1996 work injury and her eventual transfer to Baskin Robbins sometime in April 1998, Claimant had three objective scans and tests done of her back and neck area. The earliest radiological study, done on February 12, 1997, showed that Claimant had "calcific tendonitis" of the right shoulder and "minimal degenerative spondylosis" of the cervical spine. CX 1 at 41; EX 5 at 26. On March 25, 1997, Dr. Miura-Akamine interpreted Claimant's EMG and nerve conduction and found these "normal," and found that there was "no electro-diagnostic evidence of right carpal tunnel syndrome or right cervical motor radiculopathy." CX 1 at 49; EX 5 at 32. On June 6, 1997, from an MRI of Claimant's cervical spine, a Kaiser radiologist extensively described the Claimant's cervical spine: "the C2-3 disc . . . appeared unremarkable;" "C3-4…without significantly deforming the cervical cord;" "neural foramina are reasonably well maintained;" "C6-7…without significantly deforming the cervical cord. Neural foramina are reasonably well maintained at the C6-7 level;" "C7-11…and 1l-[12]… appear unremarkable." CX 1 at 40; EX 5 at 29-30. However, this radiologist did mention that "end-plate spurring is more prominent at [the] C4-5 level…results in effacement of the ventral thecal space and mild deformity of the cord as well as right lateral recess and right neural foraminal stenosis." CX 1 at 40; EX 5 at 29-30.

After Claimant's transfer to Baskin Robbins, her radiographic studies showed similar findings. On June 5, 1998, radiologist Dr. Peter Clapp continued to note "degenerative disc disease of the cervical spine…a narrowing of the C4-5 disc with secondary degenerative changes" and a "very early foraminal encroachment" that was "most marked at C4-5 on the right of doubtful significance." Again, he observed that "other disc spaces and vertebral body heights appear well maintained and posterior elements are intact." CX 1 at 39; EX 5 at 31. On July 16, 1998, while Claimant complained of "constant pain," Dr. Sandor noted "no palpable muscle spasm" in the neck region, normal range of motion of the shoulders, and "no abnormality can be

found in the upper extremities. Sensation is intact to light touch . . . There is no muscular wasting." CX 1 at 21; EX 5 at 38-39.

All these observations and opinions support Employer's argument Claimant's condition is degenerative in nature, and in essence, quite minor.

As a result, I find that Employer has rebutted the section 20(a) presumption that Claimant suffered a work-related injury on November 3, 1996.

c. The Weight of the Evidence Shows That Claimant Suffered a Work-Related Injury on November 3, 1996

As referenced above, Claimant's credibility presents a significant question throughout this case. However, on the question of whether a specific injury ever occurred in November 1996, I find that the weight of the evidence shows that Claimant suffered a work-related injury to her neck and back on November 3, 1996 when she lifted the 50 pound canister she described at trial. Once again, the mechanics of her injury - lifting a heavy object and pulling some muscles - are commonplace enough that it is reasonable for Claimant to not immediately seek medical attention or even understand it as a "trauma" event. I put great weight on Dr. Cheng's opinion that Claimant "may not understand that lifting can be traumatic" and that this reluctance to seek medical attention initially is consistent with Claimant's culture group and the nature of this injury. Cheng DP at 18. Also telling is the consistency that appeared later in 1997 and continued with Claimant going back to November 1996 as the start of her serious health problems as well as the fact that a large majority of her medical records from 1997-2000 reference the date of initial injury as November 1, 1996. I give great weight to the fact that Dr. Sandor, her most frequent treating physician, lists her date of injury as November 1, 1996. *See* CX 1 at 41; EX 5 at 23-24; 40,44,47,58-68. EX 5. Finally, Claimant's medical history also shows that prior to her alleged injury in November 1996, she had no treatment or complaints to the neck and back area. EX 5 at 38. In fact, the records consistently show that prior to the alleged injuries at issue in this case, Claimant's past medical history was "rather unremarkable." EX 5 at 27. This evidence simply outweighs Employer's evidence that unsuccessfully tries to compare Claimant's condition after November 3, 1996 with her condition before that time.

Consequently, I further find that although Dr. Ma, Employer's independent medical expert, has rebutted the section 20(a) presumption of work-related injury with his opinion, the weight of the evidence, when one looks at the record as a whole, proves that Claimant suffered a work-related injury at Employer on November 3, 1996 that led to the symptoms about which she has been complaining.

2. Timeliness of Notice under Section 12

Employer argues that Claimant did not give timely notice of her specific injury on November 3, 1996 according to section 12(a) of the Act, such that the claim is time-barred.

a. Actual Notice

Section 12(a) of the Act provides: "Notice of an injury ... in respect of which compensation is payable under this Act shall be given within thirty days after the date of such injury or death, or thirty days after the employee or beneficiary is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of a relationship between the injury ... and the employment." Section 12(b) requires that "[s]uch notice shall be in writing, shall contain the name and address of the employee and a statement of the time, place, nature and cause of the injury …, and shall be signed by the employee[.]" Section 12(c) states that notice may be given to the deputy commissioner or to "any agent or officer upon whom legal process may be served or who is in charge of the business in the place where the injury occurred" and as designated by the employer. 33 U.S.C. § 912 (2005).

Claimant conceded that she was aware of a work-related injury on November 3, 1996. ALJX 2 at 3. Claimant alleges that she gave notice on the date of the injury by telling her supervisor Evalani Newbourg, whom she was working with at the time of injury. ALJX 2 at 3; TR at 125-26. Employer questions Claimant's testimony and argues that there is no evidence substantiating her allegation. ALJX 7 at 6. 1 find that even taking Claimant's allegation as it stands is insufficient to satisfy the requirements of section 12(b) that "[s]uch notice shall be in writing, shall contain the name and address of the employee and a statement of the time, place, nature and cause of the injury …, and shall be signed by the employee." The earliest written notice complying with the requirements of section 12(b) was not filed with the Employer until July 14, 1998, more than 19 months after the injury. Therefore I find that Claimant did not give timely notice of her November 3, 1996 injury.

b. Notice by Knowledge without Prejudice

Section 12(d) provides that failure to provide timely notice shall not bar any claim under the Act if (1) the employer had knowledge of the injury …; (2) the employer was not prejudiced by the failure to give such notice; or (3) notice was given to an official of the employer not so designated by the employer, and that the employer was not prejudiced due to the failure to provide notice. 33 U.S.C. § 912(d) (2005). The "knowledge" requirement of section 12(d)(1) is fulfilled if employer knows of the injury and has facts that would lead a reasonable person to conclude that compensable liability is possible, and that he therefore ought to investigate the matter further. *Stevenson v. Linens of the Week,* 688 F.2d. 93, 100 (D.C. Cir. 1982); *Stark v. Washington Star Co.,* 833 F.2d 1025, 1028 (D.C. Cir. 1987).

Employer contends that there is a lack of evidence substantiating Claimant's testimony that she reported the November 3, 1996 incident immediately thereafter. ALJX 7 at 6. Ms. Veronica Manz, Employer's Human Resource Manager, testifies that Employer trains all their supervisors to report work-related injuries and submit related paperwork to the Human Resource Department within 24 hours of any incident. TR at 79. Employer's argument is that if Claimant did tell Ms. Newbourg of her injury that same day, Ms. Newbourg, as the supervisor, would have filed the necessary paperwork with the Human Resource Department.

Assuming that a conversation between Claimant and Ms. Newbourg about the alleged injury did take place, upon hearing that Claimant had pulled some muscles, Ms. Newbourg's response was to tell Claimant to "take it easy" because she (Ms. Newbourg) has done the same thing at work before. TR at 125-26. This apparent belief that Claimant's injury was minor and would heal on its own is consistent with the fact that Claimant did not seek treatment nor miss work until three months later in February 1997. That being Ms. Newbourg's understanding of the seriousness of the injury, I do not find it to constitute a "knowledge" of a work-related injury that would "lead a reasonable person to conclude that compensable liability is possible, and that he ought to investigate the matter further." *Stevenson,* supra, at *100; Stark,* supra, at 1028. Moreover, because Claimant's initial injury seemed minor, her subsequent failure to indicate otherwise to Employer renders it more unreasonable to infer any "knowledge" on Employer's part of its likely liability. Therefore, I do not find Employer to have "knowledge" of Claimant's injury that would excuse the latter's failure to give timely notice of the claim.

Additionally, an untimely notice will be excused if an employer is not prejudiced. 33 U.S.C. § 912(d). An employer may be considered prejudiced if it was unable to determine and investigate the immediate circumstance and extent of a claimant's work-related injury allegation. *Addison v. Ryan-Walsh Stevedoring Co.,* 22 BRBS 32 (1989). Here, Claimant's delay resulted in a time gap of a year and a half between the alleged injury and Employer's earliest indication of its likely compensation liability. By 1998, when Claimant filed the injury notice, she was no longer working at Cafe Pearl, where she was injured. Employer was not able to investigate the nature and extent of Claimant's injury, which would be of special importance because the main thrust of her allegation is that her condition has aggravated from a minor injury to a totally debilitating one. Moreover, timely notice to Employer likely could have provided Claimant with proper medical care or work restrictions that may have prevented further aggravation.

As Claimant's delayed notice is not excused by any exceptions under section 12(d), I find the specific injury claim on November 3, 1996 time-barred under section 12.

3. Timeliness of Filing a Claim - Section 13

Alternatively, Employer contends that Claimant did not file a claim for the specific injury on November 3, 1996 in a timely manner.

Section 13 of the Act provides that a claim will be time-barred unless it is filed within one year of the injury or death. The time for filing a claim does not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury ... and the employment. 33 U.S.C. 913(a) (2005). Section 13 must be read in conjunction with sections 30(a) and 30(f) of the Act. *Wendler v. American Nat'l Red* Cross, 23 BRBS 408 (1989). Section 30(a) requires that an employer submit to the Secretary of Labor a report of a claimant's injury within ten days of the date it has knowledge of that injury. 33 U.S.C. 930(a). Section 30(f) tolls the filing period under section 13 until the employer complies with the requirement of section 30(a). *See Bustillo v. Sothwest Marine, Inc.,* 33 BRBS 15 (1999); *Nelson v. Stevens Shipping & Terminal Co., 25* BRBS 277 (1992); *Ryan v. Alaska Constructors, Inc.,* 24 BRBS 65 (1990). However, section 30(f) does not toll the limitation period of section 13(a) if Employer was not given notice of the work-

relatedness of the injury. *Stark v. Washington Star Co.,* 833 F.2d 1025, 20 BRBS 40 (CRT) (D.C. Cir. 1987); *Keatts v. Horne Bros., Inc.,* 14 BRBS 605 (1982).

As mentioned above, Claimant was aware that she suffered a work-related injury on the day of the injury on November 3, 1996. As such, Claimant's filing a claim on July 14, 1998 was outside the one year statutory period for section 13. Claimant is not entitled to the tolling provision of section 30(f) because she failed to give Employer timely notice in the first place. Therefore, I find that Claimant's claim of specific injury on November 3, 1996, is time-barred by section 13 of the Act as well.

4. Medical Benefits

An employer has a continuing obligation to pay an injured employee's medical expenses, even if the claim is time-barred by sections 12 or 13. *Strachan Shipping Co. v. Hollis,* 460 F.2d 1108 (5th Cir.); *Willson v. Southern Stevedore Co., 1* BRBS 123 (1974); *Todd Shipyards Corp. v. Black,* 717 F.2d 1280,16 BRBS 13 (CRT) (9th Cir. 1983), *aff'g* 13 BRBS 682 (1981). Therefore, any and all of Claimant's requests for medical benefits arising out of her November 3, 1996 injury at work will be duly considered.

Medical care, including reasonable and necessary cost of transportation to and from medical treatment, is defined as that "which is recognized as appropriate by the medical profession for the care and treatment of the injury or disease." 20 C.F.R. § 702.401 (2005). In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. *Pernell v. Capitol Hill Masonry, 11* BRBS 532, 539 (1979). I find that Claimant is entitled to recover her reasonable medical expenses arising out of her November 3, 1996 injury at work.

Alleged Cumulative Trauma Injury through July 7, 1998

Claimant brings a second claim alleging that she sustained cumulative trauma injury through her last day of work for Employer on July 7, 1998. She alleges that her work at Baskin Robbins aggravated her existing injury and caused associative psychological injuries. TR at 134-35. Claimant seeks temporary total disability benefits from July 27, 1998 to October 28, 2000; and permanent total disability benefits from October 29, 2000 to the present and continuing. TR at 6.

Employer, on the other hand, contends that Claimant did not give timely notice of this claim under section 12 of the Act, such that it is also time-barred. Alternatively, Employer argues the psychological elements of Claimant's disability are not work-related, and that by September 29, 1998, suitable alternative employment was identified for Claimant, which ought to terminate Claimant's entitlement to disability benefits. ALJX 7 at 12-13.

1. Timeliness of Notice - Section 12

Employer argues that Claimant's claim of cumulative traumatic injury through the last day of work is time-barred under section 12.

a. Actual Notice

As discussed above, section 12(a) of the Act provides: "Notice of an injury ... in respect of which compensation is payable under this Act shall be given within thirty days after the date of such injury or death, or thirty days after the employee or beneficiary is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of a relationship between the injury ... and the employment." Section 12(b) requires that "[s]uch notice shall be in writing, shall contain the name and address of the employee and a statement of the time, place, nature and cause of the injury …, and shall be signed by the employee[.]" Section 12(c) states that notice may be given to the deputy commissioner or to "any agent or officer upon whom legal process may be served or who is in charge of the business in the place where the injury occurred" and as designated by the employer. 33 U.S.C. § 912 (2005).

Claimant last worked for Employer on July 7, 1998. She did not file any written notice to Employer until six months later, on January 19, 1999, when she filed a claim for worker's compensation alleging cumulative trauma injury to her low back, hip, and arm through her last days of employment in July 1998. EX 6 at 93; EX 3 at 7. Claimant's repeatedly testified that after her transfer to Baskin Robbins, her condition became worse because of the repeated bending and forceful scooping motion with her arm. TR at 134-35. Prior to Claimant's last day of work, she had already received a work slip from Dr. Sandor indicating that she is to do "no ice cream scooping." CX 1 at 26. These facts indicate that Claimant was aware on her last day of work on July 7, 1998 that her injury was work related. Therefore, I find that Claimant did not comply with the requirement of section 12 to file a written notice to Employer within 30 days of realizing her work-related injury.

b. Notice by Knowledge with Absence of Prejudice

Section 12(d) provides that failure to provide timely notice shall not bar any claim under the Act if (1) the employer had knowledge of the injury …; (2) the employer was not prejudiced by the failure to give such notice; or (3) notice was given to an official of the employer not so designated by the employer, and that the employer was not prejudiced due to the failure to provide notice. 33 U.S.C. § 912(d) (2005). The "knowledge" requirement of section 12(d)(1) is fulfilled if employer knows of the injury and has facts that would lead a reasonable person to conclude that compensable liability is possible, and that he therefore ought to investigate the matter further. *Stevenson v. Linens of the Week,* 688 F.2d. 93, 100 (D.C. Cir. 1982); *Stark v. Washington Star Co.,* 833 F.2d 1025, 1028 (D.C. Cir. 1987).

Employer received a work slip as early as June 4, 1998, which indicated that Claimant was to do "no ice cream scooping." It was also because of this work restriction that Employer advised Claimant to go home and wait for notification of a suitable light duty position. I find sufficient for the "knowledge" exception of section 12(d)(1), that Employer did have actual knowledge that Claimant was injured and that her injury arose or was aggravated from duties at work. Moreover, I find that Employer did not suffer any prejudice in its ability to investigate and respond to this claim, because the June 1998 work slip should have made Employer aware

that there was a potential for compensation liability. Therefore, I do not find Claimant's cumulative traumatic injury claim to be time-barred by section 12.

2. Nature and Extent of Injury

a. Prima Facie Case

Claimant alleges that she suffered cumulative injury to her neck, back, and psyche as a result of her work activities at Baskin Robbins through July 7, 1998. Employer contends that all of Claimant's physiological conditions are degenerative in nature and have not been aggravated by her work activities, and that her alleged psychological injury is not work-related.

To establish a *prima facie* case under the Act, a claimant must show that he or she has suffered some harm or pain, and that an accident occurred or that working conditions existed that could have caused the harm. *Murphy v. SCA/Shayne Brothers, 7* BRBS 309 (1977); *Kelaita v. Triple A Mach. Shop,* 13 BRBS 326 (1981). A claimant's *prima facie* case will invoke section 20(a) of the Act, commonly referred as the section 20(a) presumption, which states that "in any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary that the claim comes within the provision of this Act." 33 U.S.C. § 920(a) (2005). However, if the employer offers substantial evidence to justify the denial of the claim, the presumption is rebutted and the issue must be determined only on the evidence in the case. *Universal Maritime Corp. v. Moore,* 126 F.3d 256 (4th Cir. 1997). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Container Stevedoring Co. v. Director, OWCP,* 935 F.2d 1544, 1546 (9th Cir. 1991).

Claimant testified that most of her duties at Baskin Robbins consisted of bending down into a freezer and scooping ice cream, and that while she worked there, her arms, legs, back and neck all became worse. TR at 134-35. As early as June 5, 1998, Claimant relayed to her physician at Kaiser that the "pain was getting worse" and received a work slip which prescribed "no ice cream scooping" and only "occasional bending" at work. CX 1 at 26. Later, Claimant's treating physician opined in August 2000 that Claimant's degenerative disk disease of her lumbar and cervical spine "could have been aggravated by work activities involving repetitive stooping and forceful activities of the upper extremities," such as Claimant's work scooping ice cream. CX 1 at 11.

I find this sufficient to invoke the section 20(a) presumption. Furthermore, Employer supports this presumption by conceding that Claimant has likely satisfied her burden of establishing a *prima facie* case. ALJX 7 at 7. Therefore, Employer bears the burden of rebutting the section 20(a) presumption with substantial evidence.

b. Whether Claimant's Work Has Aggravated Her Condition

Employer first argues that the records as a whole show that Claimant did not suffer a compensable injury as Claimant's medical findings are all degenerative in nature. Employer

argues that all allegations that Claimant's work has aggravated her condition are based on her testimony, which should be disregarded for lack of credibility. ALJX 7 at 7.

An employer is not liable for compensation if the claimant's condition is due solely to the degenerative processes of aging. *See Haynes v. Rederi A/S Aladdin*, 362 F.2d 345 (5th Cir. 1966). However, if an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. *Independent Stevedore Co. v. O'Leary,* 357 F.2d 812 (9th Cir. 1966); *Rajotte v. General Dynamics Corp.,* 18 BRBS 85 (1986).

Here, between Claimant's November 3, 1996 work injury and her eventual transfer to Baskin Robbins sometime in April 1998, Claimant had three objective scans and tests done of her back and neck area. The earliest radiological study, done on February 12, 1997, showed that Claimant had "calcific tendonitis" of the right shoulder and "minimal degenerative spondylosis" of the cervical spine. CX 1 at 41; EX 5 at 26. On March 25, 1997, Dr. Miura-Akamine interpreted Claimant's EMG and nerve conduction and found these "normal," and found that there was "no electro-diagnostic evidence of right carpal tunnel syndrome or right cervical motor radiculopathy." CX 1 at 49; EX 5 at 32. On June 6, 1997, from an MRI of Claimant's cervical spine, a Kaiser radiologist extensively described the Claimant's cervical spine: "the C2-3 disc . . . appeared unremarkable;" "C3-4…without significantly deforming the cervical cord;" "neural foramina are reasonably well maintained;" "C6-7…without significantly deforming the cervical cord. Neural foramina are reasonably well maintained at the C6-7 level;" "C7-11…and 1l-[12]… appear unremarkable." CX 1 at 40; EX 5 at 29-30. However, this radiologist did mention that "end-plate spurring is more prominent at [the] C4-5 level…results in effacement of the ventral thecal space and mild deformity of the cord as well as right lateral recess and right neural foraminal stenosis." CX 1 at 40; EX 5 at 29-30.

After Claimant's transfer to Baskin Robbins, her radiographic studies showed similar findings. On June 5, 1998, radiologist Dr. Peter Clapp continued to note "degenerative disc disease of the cervical spine…a narrowing of the C4-5 disc with secondary degenerative changes" and a "very early foraminal encroachment" that was "most marked at C4-5 on the right of doubtful significance." Again, he observed that "other disc spaces and vertebral body heights appear well maintained and posterior elements are intact." CX 1 at 39; EX 5 at 31. On July 16, 1998, while Claimant complained of "constant pain," Dr. Sandor noted "no palpable muscle spasm" in the neck region, normal range of motion of the shoulders, and "no abnormality can be found in the upper extremities. Sensation is intact to light touch . . . There is no muscular wasting." CX 1 at 21; EX 5 at 38-39.

All these observations and opinions support Employer's argument Claimant's condition is degenerative in nature, and in essence, quite minor.

The records do contain medical evidence, however, and opinions showing that Claimant's work at Baskin Robbins most probably aggravated her condition. On the same July 16, 1998 visit to Kaiser, Dr. Sandor indicated that Claimant's condition was a "degenerative joint disease of the cervical spine," but he also mentioned Claimant's "low back pain with evidence of bursitis which "could be due to repetitive bending." CX 1 at 21; EX 5 at 38-39. On August 29,

2000, Dr. Sandor reiterated his belief that Claimant has a degenerative lumbosacral disc disease and degenerative cervical disc disease, and that "both diagnoses could have been aggravated by work activities involving repetitive stooping and forceful activities of the upper, extremities." CX 1 at 11. In addition, Dr. Cheng explained that scooping is mechanically difficult for Claimant's back because "it adds to the weight across the labor arm" and effectively placed an exponential strain on the back. She opined that Claimant's duties at the ice cream shop could "clearly aggravate her back pain and radicular symptoms into [her] arms," and that bending over to scoop ice cream hurt Claimant's lumbar spine. Cheng DP at 14, 16-17.

I find the Dr. Cheng's description about the mechanical aspect of the scooping motion a credible explanation for Claimant's allegation that she experienced a worsening of her condition while working for Baskin Robbins. I also find the opinion of Dr. Sandor, who specializes in the Occupational Health Department and has been one of Claimant's main treating physicians at Kaiser, highly reliable and trustworthy. Dr. Sandor's opinion further showed that he did not accept Claimant's testimony unquestioningly when he observed that there was "no palpable muscle spasm" and "no abnormality" despite Claimant's subjective complaints of pain. Yet despite this, Dr. Sandor opined that Claimant's condition could be due to repetitive bending, stooping, and forceful activities of the upper extremities. CX 1 at 11, 21; EX 5 at 38-39. These opinions represent credible expert testimony regarding the high probability that Claimant's work at Baskin Robbins aggravated her existing degenerative neck and back conditions.

I have deliberately only looked at objective medical findings and testimonies because of Employer's contention that Claimant's own testimony presents credibility issues. I find sufficient objective opinions, permanent work restrictions, and evidence, however, to support Claimant's aggravation claim. Not one physician opined for Employer that Claimant's work through July 7, 1998 with Employer did not aggravate or accelerate her neck and lower back conditions such that she was not subject to permanent work restrictions. As I do not find that Employer has met its burden in showing that Claimant condition is entirely degenerative, Claimant's cumulative trauma work-related injury from July 7, 1998 is generally compensable.

c. Alleged Psychological Injury

Claimant also alleges that because of her physical injury sustained from work, she developed various psychological conditions, which rendered her totally and permanently disabled. ALJX 6 at 5. Employer generally disputes any casual connection between Claimant's psychological problems and her work injury. ALJX 7 at 9.

As Claimant's medical records contain a distinctive occurrence of a psychotic episode in 1998, as well as ongoing discussions of depression and chronic pain complaints, I will address them separately.

i. Psychotic Episode: September 1998 - December 1998

Generally, a psychological disability is compensable if it is work related. *OWCP v. Potomac Elec. Power Co.,* 607 F.2d 1378, 1387 (D.C. Cir. 1979) (a work injury resulting in psychological problems which led to suicide is compensable); *American Nat'l Red Cross v.*

Hagen, 327 F.2d 559 (7th Cir. 1964) (acute schizophrenia reaction arising out of claimant's work environment constitutes a compensable injury); *Dygert v. Manufacturer's Packaging Co.,* 10 BRBS 1036, 1043-44 (1979) (conversion hysteria caused by work-related injury, although wholly psychological in nature, is compensable).

Beginning in September 1998 and continuing for a four month period, Claimant displayed signs of a psychotic disorder. On September 29, 1998, Dr. Sandor noticed that Claimant had a "very depressed affect, [was] tearful but with an incongruent mood as patient says she is happy[.]" He referred Claimant to Kaiser Mental Health Services. CX 1 at 15; EX 5 at 44. On October 20, 1998, Dr. Sandor noted that Claimant was being treated "for [a] *non-industrial-related* medical condition." EX 5 at 47.

Claimant was treated by Dr. Michael McCanless, a psychiatrist, for a two-month period. She reported that she was hearing voices telling her that something bad was going to happen to her loved ones. She was also fearful and had to keep the blinds closed at home. EX 5 at 45. Dr. McCanless noted a psychotic disorder, and opined that while it could be secondary to depression, it had "no obvious organic cause." He was also concerned with symptoms of nervousness and paranoia that were more characteristic of a schizophrenic disorder. EX 5 at 45-46. Claimant visited Dr. McCanless three times, and each time showed marked improvement. On her last visit on December 10, 1998, Claimant was scheduled for a follow up appointment in three months, which never occurred. EX 5 at 50. Throughout the treatment, Dr. McCanless consistently noted a flattened or subdued affect, even when Claimant's psychotic episode and auditory hallucinations subsided. ,EX 5 at 45-50.

During the four months from September to December 1998, Claimant displayed the most pronounced signs of a psychiatric disorder that involved auditory hallucinations and paranoia behaviors. However, both Dr. Sandor and Dr. McCanless did not opine that Claimant's affective disorder and psychological disorder were related to her work injury. The record shows that prior to September 1998, Claimant's physical condition was improving. On July 16 and 21, 1998, Dr. Sandor released Claimant to full duty work, with the only restriction being "no ice cream scooping." CX 1 at 20-22; CX 9 at 158; EX 5 at 38-39. On July 30, 1998, Dr. Sandor noted that Claimant felt better and was smiling because she thought she had been granted disability. EX 5 at 40. Additionally on that date, Claimant was asymptomatic with sitting and believed that she was eligible for vocational rehabilitation for sedentary work. *Id*. Then, on September 29, 1998, when Dr. Sandor noticed a "very depressed affect" and "incongruent mood" in Claimant, he took her off work from September 29, to October 24, 1998 and postponed the IME until the affective disorder has stabilized. Dr. Sandor noted that Claimant's chronic neck and back problems had reached maximum medical improvement, and that she was disabled from work primarily for the affective disorder. CX 1 at 15; EX 5 at 44. Dr. Sandor explicitly stated that Claimant was being treated for a "non-industrial-related medical condition." EX 5 at 47. The fact that this psychotic episode occurred while Claimant's physical condition was improving tends to rebut the argument that the psychological condition is an outgrowth, or is caused by, the physical symptoms.

In addition, while Dr. McCanless was aware that Claimant was being treated for an injury at work, his records show that he was not concerned with it during his evaluation and treatment. He noted that Claimant "was on disability because of a back injury received at work," and

described it very cursorily as "she was lifting something." EX 5 at 45-46, 48. He made no comments to connect the psychological problem with the work injury in any way and showed no need to further inquire about the work injury. Conversely, after a couple of sessions when Claimant's auditory hallucinations subsided and her condition seemed to have stabilized, Dr. McCanless noted that "she mostly complains about physical pain" by way of suggesting that Claimant was no longer suffering from her psychotic disorder as much. EX 5 at 49-50. This tends to show that Dr. McCanless did not attribute a casual connection between Claimant's psychotic behavior and her work injury.

For all the above cited reasons, I find that Claimant's psychiatric disorder from September to December 1998 was not work-related, and therefore, not compensable.

ii. Depression and Chronic Pain Disorder

Claimant offers medical testimony that as a result of her work injury, she suffers multiple psychological disorders, including a depressive disorder and a chronic pain syndrome. Employer generally contests the causal relationship between any psychological problems and the injuries sustained from work.

Case law has upheld the general principle that if a resulting disability, including chronic pain syndrome, is caused or aggravated by a work injury, it is compensable under the Act. *Wilson v. Todd Shipyards Co., 23* BRBS 24, 28 (ALJ) (1989) (holding that if a claimant perceives that his pain is due to his work accident, then his chronic pain syndrome must be related at least in part to his back injury from work); *In re Guzman v. Todd Pacific Shipyards,* 24 BRBS 14 (ALJ) (1990) (the claimant suffered from major depression and chronic pain syndrome from a work injury, which rendered him totally disabled from any employment).

Where the alleged injury involves primarily subjective complaints, such as depression and chronic pain, however, prior case law has also taken special care to analyze issues of malingering and credibility. In the case of *Guzman v. Todd Pacific Shipyards,* the claimant and employer presented a host of divergent medical opinions, with one side suggesting that objective medical findings did not justify the degree of pain of which the claimant complained and that he had a "less-than-optimal motivation to return to work," and the other side suggesting that Claimant sincerely suffered from major depression and chronic pain syndrome. 24 BRBS at 17, 19. Eventually, the ALJ found the claimant's testimony and his demeanor at trial to be credible and sincere. However, the most convincing evidence was that claimant lost 41 pounds from the time of injury to the time of trial. The ALJ stated, "his 41-pound weight loss is of such significance as to lead to the conclusion that such weight loss was not calculated or feigned but is, in fact, the result of his severe chronic depression resulting from his chronic pain syndrome." *Id.*at 21.

Here, while the record is replete with notes reflecting Claimant's depressed affect and her complaints of chronic pain, I find that overall Claimant's testimony and representation regarding the severity of her pain is not credible.

As mentioned above when discussing Claimant's general credibility, I find that, first, Claimant's complaints of severe pain do not seem to be supported by objective medical findings. Secondly, on more than one occasion, Claimant has been observed to physically move about freely and unhindered by her alleged pain symptoms. Moreover, Claimant's depression and pain disappeared completely in July 1998 when she thought she had been granted disability. EX 5 at 40. And thirdly, on too many occasions, different physicians have made note of Claimant's deliberately reduced effort on physical examinations.

On the one hand, I recognize that, as Dr. Cheng explained, chronic pain disorder is precisely when a patient's prolonged pain "brings in other psychological stressors ... that compound and make pain, and impairment somewhat beyond what would be expected from the physical injury/abnormality." Cheng DP at 8. Hence, I acknowledge that the lack of objective medical findings in and of itself does not necessarily invalidate Claimant's chronic complaints. However, the evidence and testimony of witnesses indicate too many instances where Claimant's conduct is contrary to her subjective complaints and where her credibility and sincerity is questioned. Looking at the evidence as a whole, I do not find Claimant's allegations of pain and apparent physical distress credible.

Other than Claimant's own subjective complaints of chronic pain, she also presented the psychological evaluation by Dr. Chalsa Loo, a licensed clinical psychologist who examined her in January 2005. Dr. Loo diagnosed Claimant as suffering from chronic pain disorder, depressive disorder, mood disorder, sexual aversion disorder, and anxiety disorder. Dr. Loo believed that all these conditions are either directly work-related or secondarily so through a loss of earning capacity. CX 9 at 166-67.

Employer rebuts this evidence with the expert opinion of Dr. Boyd Slomoff, a psychiatrist, who opined that Claimant has "developmental *pre-injury* personality traits" that gave rise to a somatoform presentation, which is manifested as a pain disorder. As such, Dr. Slomoff felt that Claimant's psychological disorder, if any, is unrelated to her industrial injuries. EX 15 at 326-27.

As a preliminary issue, although Claimant's injury occurred more than eight years prior to the hearing, psychological damage did not become a much emphasized issue of Claimant's claim until merely two months before the hearing, when Dr. Ma suggested that Claimant's disability is really caused by her "personality." CX 3 at 102-03. Dr. Loo's report was not submitted until just days before the hearing, and Dr. Slomoff's evaluation was not conducted until after the hearing. EX 9 at 154; EX 15 at 299. Claimant contests the admissibility of Dr. Slomoff's report because Employer had not submitted the requisite curriculum vitae. However, in light of the overall hastiness surrounding this late-surfacing issue and the unfairness that would result from denying Employer an opportunity to counter Claimant's expert evidence, I excuse this technical error on Employer's part and find that Claimant has not impeached or disqualified Dr. Slomoff. Moreover, Claimant's counsel did not object at trial to the admission of Dr. Slomoff's post-hearing report. *See* TR at 13-16.

After reviewing the reports of both Dr. Loo and Dr. Slomoff, I find that neither opinion should be credited given the lengthy gap in their examination of Claimant and when the claim

allegedly arose in 1998. I find that Dr. McCanless, Dr. Luke, and Dr. Sandor's opinions that any psychological condition suffered by Claimant is either insignificant or not work-related outweigh the recent opinions of Drs. Loo and Slomoff.

In addition, evaluating the reports substantively, I find the Dr. Loo's report critically omitted Claimant's history of psychotic disorder and auditory hallucination as treated by Dr. McCanless. CX 9 at 157-61. This gaping omission renders Dr. Loo's basis for her medical opinion incomplete and inaccurate. Secondly, Dr. Loo also described the process of obtaining information from Claimant as "difficult," because Claimant seemed repeatedly distracted by the pain she was apparently experiencing and because of Claimant's "non-elaboration of verbal disclosure." CX 9 at 154-55. This is especially troubling when coupled with the earlier discussion about Claimant's questionable representation about her pain symptoms.[4] Given this set of circumstances, and the remoteness in time between Dr. Loo's evaluation and the time of Claimant's injury, I find Dr. Loo's overall basis for her medical opinion to be unreliable.

While Dr. Slomoff's opinion faces the same criticism regarding the remoteness in time between the psychological evaluation and the actual injury eight years earlier, he did indicate that Claimant became more conversant as the discussion turned to topics of interest to her, such as her childhood and Western Samoa. EX 15 at 327. Dr. Slomoff reached an indefinite conclusion as to the relationship between Claimant's psychological state and her work injuries, stating that more information was needed and that "based on the evidence currently available, [the relationship between the work injury and Claimant's psychological state was] a coincident temporal one." EX 15 at 327.

It is noteworthy that the opinions of Dr. Loo and Dr. Slomoff are similar on many points. They both found that, for example, Claimant has a pain disorder, is depressed and anxious to a certain extent, and can become excessively concerned about vague physical symptoms. CX 9 at 164; EX 15 at 326. Both experts relied on the same medical records, interviewed the Claimant for several hours, and evaluated Claimant around the same time. That they arrived at inconsistent conclusions as to the causation of Claimant's psychological state is itself strong support for Dr. Slomoff's opinion that this causation issue is vague and likely not readily discernable with the basis now available before us. As a result, I find that Claimant has not met her burden of proof showing that her work with Employer caused or aggravated her psychological condition.

I give less weight to the independent medical evaluation psychiatric report from Dr. Loo, and give greater weight to the treating physician psychiatric reports by Drs. McCanless and Luke, as Dr. Loo's report is based upon partial facts that do not include all of the daily activities and social events that Claimant participated in leading up to her evaluation. Claimant was much

[4] For example, there is evidence that Claimant's pain symptoms immediately disappeared once she thought she was granted disability as in a July 30, 1998 interim industrial report by Dr. Sandor, he noted that "the patient [Claimant] today is smiling and she stated, 'They granted me disability.' 'I feel so much better, I am so relaxed.'" Claimant described to Dr. Sandor that since she can sit down whenever she wanted to and that her symptoms have greatly abated, but that the pain returns with prolonged walking but that it goes away "as soon as she sits down." Dr. Sandor believed that Claimant had chronic neck and back pain; he noted that since Claimant was asymptomatic with sitting, she was eligible for vocational rehabilitation for sedentary work. EX 5 at 40.

more forthcoming with Drs. McCanless and Luke about not suffering from a depressed mood while also maintaining good insight and judgment. EX 5 at 45-46,48-50; EX 14 at 250-52. As a result, Claimant did not establish any continuing inability to return to work due to any psychiatric condition. Alternatively, even if a psychiatric condition existed, it was unrelated to her work and, instead, related to Claimant's pre-existing psychotic disorder and cultural background. *Id*.

Thus, I find that Claimant was not prevented from returning to her former longshore employment by any psychiatric condition. In making this determination, I rely on Claimant's testimony and appearance at hearing and the fact that she regularly provided daycare services for her four grandchildren, drove them to and from school, and took them on vacation to San Francisco in 2003. TR at 186-190. Also, Claimant testified that she reads a lot and listens to the radio. TR at 189. This is inconsistent with Claimant's statements made to her doctors which formed the basis for a diagnosis of major depression. Based on these inconsistent statements by Claimant, I find that she is not a trustworthy witness.

Based on all the discussion above, I find that Claimant's claim of debilitating chronic pain and psychological injury arising from her physical injuries is, as a whole, unsubstantiated and of questionable veracity. Consequently, I find that Claimant has not suffered a compensable psychological injury in this claim.

Date Of Maximum Medical Improvement

Claimant contends that her work-related physical impairments did not reach the point of maximum medical improvement until November 10, 2004, when she saw Employer's expert orthopedic surgeon, Dr. Ma, for her physical condition. Claimant contends that she has not yet reached MMI as to her psychological condition. ALJX 6 at 10. In contrast, Employer contends that any work injury Claimant may have suffered reached the point of permanent maximum medical improvement on October 30, 2000, as determined by treating orthopedic physician Dr. Sandor as to her physical condition, and that Claimant did not develop any work-related psychological condition. ALJX 7 at 9-15; EX 5 at 66.

A disability will be considered permanent if the claimant's impairment has continued for a lengthy period and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp*., 400 F.2d 649, 654 (5th Cir. 1968). *See also Crum v. General Adjustment Bureau*, 738 F.2d 474, 480 (D.C. Cir. 1984)(physician's evaluations of the claimant indicated that his heart condition, although improved, was of indefinite duration); *Air America, Inc. v. Director, OWCP*, 587 F.2d 773, 781-82 (1st Cir. 1979); *Care v. Washington Metr. Area Transit Auth*., 21 BRBS 248, 251 (1988).

Permanent does not, however, mean unchanging. Permanency can be found even if there is a remote or hypothetical possibility that the claimant's condition may improve at some future date. *Watson,* 400 F.2d at 654; *Mills v. Marine Repair Serv.*, 21 BRBS 115, 117 (1988); *Brown v. Bethlehem Steel Corp*., 19 BRBS 200, 204, *aff'd on recon*, 20 BRBS 26 (1987). Likewise, a

prognosis stating that chances of improvement are remote is sufficient to support a finding that a claimant's disability is permanent. *Walsh v. Vappi Constr. Co.*, 13 BRBS 442, 445 (1981); *Johnson v. Treyja, Inc*., 5 BRBS 464, 468 (1977).

The question of whether a claimant's condition has reached the point of maximum medical improvement is primarily an issue of fact and must be resolved on the basis of medical rather than economic evidence. *See Williams v. General Dynamics Corp.,* 10 BRBS 915 (1979); *Ballesteros v. Willamette Western Corp*., 20 BRBS 184 (1988); *Dixon v. John J. McMullen and Associates, Inc.*, 19 BRBS 243 (1986); *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56 (1985). The mere possibility that a claimant's condition may improve in the future does not by itself support a finding that a claimant has not yet reached the point of maximum medical improvement. *See Brown,* 19 BRBS at 204. A condition is not permanent, however, as long as a worker is undergoing treatment that is reasonably calculated to improve the worker's condition, even if that treatment may ultimately be unsuccessful. *See Abbott v. Louisiana Insurance Guaranty Ass'n*, 27 BRBS 192, 200 (1993), *aff'd sub. nom, Louisiana Insurance Guaranty Ass'n. v. Abbott*, 40 F.3d 122, 126 (5th Cir. 1994).

Here, Claimant's treating physicians, Dr. Sandor and Dr. Scarpino, both agreed that Claimant had reached maximum medical improvement as of October 30, 2000. EX 5 at 66-69. As Claimant's treating physician, Dr. Sandor's opinion regarding Claimant's maximum medical improvement and work abilities is entitled to greater weight than that of Dr. Cheng, who examined Claimant on only three occasions far removed from the years of Claimant's alleged work injuries from 1996 through 2001. *See Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998)(holding that a treating physician's opinion is entitled to more weight than non-treating physician). Moreover, I have previously rejected Dr. Cheng's opinions on the basis that he relied heavily on Claimant's noncredible subjective complainants and presentation.

In the absence of substantial countervailing evidence, and because I find the opinions of these Drs. Sandor and Scarpino credible, consistent with the record, and thereby persuasive, I conclude that Claimant reached maximum medical improvement on October 30, 2000. EX 5 at 66-69.

Permanent Partial Disability

If a claimant has established that with her physical restrictions she cannot return to her regular work, he or she will be considered permanently totally disabled unless the employer establishes suitable alternative employment. *See EX 5 at 66; Clophus v. Amoco Oroduction Co.*, 21 BRBS 261 (1988). The employer must show the existence of realistically available job opportunities within the geographical area where the claimant resides which he is capable of performing, considering his age, education, work experience, and physical restrictions. *See Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327 (9th Cir. 1980); *Pilkington v. Sun Shipbuilding & Dry Dock Co.*, 9 BRBS 473 (1978). If the employer meets its burden and establishes suitable alternative employment, the burden shifts back to the claimant to prove a diligent search and willingness to work. *See Edwards v. Director, OWCP*, 999 F.2d 1374(9th Cir. 1993); *Williams v. Halter Marine Service*, 19 BRBS 248 (1987).

The judge may rely on the testimony of vocational counselors regarding specific job openings to establish the existence of suitable positions. *See Turney v. Bethlehem Steel Corp*., 17 BRBS 232 (1985). The counselors must identify specific available positions; labor market surveys are not enough. *See Campbell v. Lykes Bros. Steamship Co.*, 15 BRBS 380 (1983). The judge may credit a vocational expert's opinion even if the expert did not examine the claimant, as long as the expert was aware of the claimant's age, education, industrial history, and physical limitations when exploring the local job opportunities. *See Southern v. Farmers Export Co.*, 17 BRBS 64 (1985).

a. Claimant's Inability to Return to Her Usual Work

Claimant has been under a work restriction of limited lifting to 25 pounds occasionally, limited bending to occasional, avoid kneeling and crawling, and "avoiding ice cream scooping" as of October 30, 2000. EX 5 at 66. Thus, Claimant has established that she is unable to return to her former position as an ice cream scooper or kitchen worker.

b. Alternative Suitable Employment

As mentioned above, Employer bears the burden of establishing the existence of realistically available job opportunities within the geographic area in which Claimant resides and which she is capable of performing considering her age, education, work experience, and physical restrictions, and which she could realistically secure if she diligently tried. *Hansen v. Container Stevedoring Co.,* 13 BRBS 155, 159 n.5 (1997).

Since Claimant has established that she is unable to return to her former position, Employer has the burden of showing that there are alternative positions available to her. In an effort to show that Claimant can obtain and perform suitable alternative employment with other employers in the Honolulu, Hawaii metropolitan area, Employer submitted two reports by vocational consultant Eileen Figueroa. EX 13. These reports together purport to show that as of January 11, 2005, there were seven open positions that, in Ms. Figueroa's opinion, met the restrictions imposed by Dr. Sandor, matched the functional capacity evaluation from October 2000, and also took into consideration Claimant's age, education, and work experience. TR at 199-211; EX 5 at 66; EX 13.

With respect to Claimant's alleged psychological limitations, Ms. Figueroa testified that she did not consider any such limitations. TR at 225-26. As referenced above, I reject Claimant's contention that any psychological condition limits her ability to perform the entry level positions referenced above in Ms. Figueroa's labor market survey and testimony. Once again, Claimant has demonstrated her ability to care for her grandchildren, drive them to and from school, drive to her lawyer's office 30 miles from her house, testify at hearing, and fly four to five hours to San Francisco to vacation with her family without any apparent psychological problems.

With regard to the physical limitations Ms. Figueroa considered, Dr. Sandor opined that as of October 30, 2000, Claimant was considered medically stationary with objective medical

evidence of permanent partial impairment related to the accepted conditions of her occupational injury of November 1, 1996. EX 5 at 66. As a result, Dr. Sandor released her to return to work in the sedentary/light category of physical demand, with restrictions of a 25 pound occasional lifting limit, only occasional bending, and no kneeling, crawling, or ice cream scooping. *Id*. Dr. Sandor's opinion of Claimant's restrictions stayed the same after he examined her again on March 10, 2001. EX 5 at 68-69.

I find that the part-time positions as a counter attendant with Dole Plantation, an appointment setter with World Talent, Inc., a table server at Plaza at Punchbowl, and a teller with Hawaii State Federal Credit Union were suitable alternative employment positions for Claimant as of January 11, 2005. *See* TR at 207-211; EX 13 at 231-36. These positions were chosen based upon their description for part-time (20 hours per week), sedentary/light physical demand, low-skill work. *Id*. Because these positions were listed as open as of January 11, 2005 and were in Claimant's geographical area, I find that these positions were available to Claimant.

In addition to the four positions being suitable as to the number of hours Claimant can work, I find that the physical requirements of the positions comport with Claimant's restrictions as no lifting in excess of 25 pounds, occasional bending, no kneeling, no crawling, and no ice cream scooping was required, and the positions allowed for Claimant to stretch and/or alternate sitting and standing. I also find that each of the positions comported with Claimant's employment experience and educational level since all the positions were entry-level and did not require any special skills other than those acquired by Claimant in prior employment.

Through Ms. Figueroa's credible testimony, Employer demonstrated that these four employers had positions available on January 11, 2005. However, Employer failed to retroactively establish that suitable alternate employment existed on the date of maximum medical improvement on October 30, 2000. *See Newport News Shipbuilding & Dry Dock Co. v. Tann,* 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988); *Rinaldi v. General Dynamics Corp.,* 25 BRBS 128 (1991); *Jones v. Genco, Inc.,* 21 BRBS 12 (1988). Thus, based on the foregoing, I conclude that Employer established the existence of suitable alternate employment on January 11, 2005, thereby rebutting the presumption of total disability.

c. Claimant's Failure To Diligently Seek Employment

If Claimant is able to present evidence of her diligence in searching for employment, she may still be considered totally disabled. *Palombo v. Director, OWCP,* 937 F.2d 70, 73 (2d Cir. 1991). Claimant is not required to apply for the specific positions identified by Employer, but need only establish that she was reasonably diligent in attempting to secure a position "within the compass of employment opportunities shown by the employer to be reasonably attainable and available." *New Orleans (Gulfwide) Stevedores v. Turner,* 661 F.2d 1031, 1043 (5th Cir. 1981).

According to Claimant, she applied for at least four of the initial seven positions listed by Ms. Figueroa just days before the hearing and had secured at least two interviews. TR at 157, 208-09. Ms. Manz noted, however, that Claimant made no apparent attempt to retain her employment when served with the proposed termination notice giving Claimant seven days to respond. TR at 89-90; EX 6 at 93. Claimant admitted that she never looked for work from July

1998 until January 2005, even after Dr. Sandor had released her for work in October 2000. TR at 179. In fact, when she saw Dr. Sandor in August 2000, Claimant told him that she was "only interested at this point in obtaining total disability in a settlement," and that she just wanted "to put it to an end and get total disability." EX 5 at 58, 60. Similarly, on January 13, 2001, Dr. Scarpino noted, "[Claimant] is not working. She is not seeking work. She is not seeking reeducation. She states that she knows her body and she knows she is not even capable of working part-time." CX 1 at 62; EX 5 at 67. On November 11, 2004, Claimant again stated to Dr. Scarpino that she knew her body and she knew she was not even capable of working part-time. EX 15 at 301. Thus, while Claimant failed to seek any work for over six years, she repeatedly expressed her desire to retire if she "had [her] way," and she stated to Dr. Slomoff that she was "ready to go home" to Western Samoa. TR at 179,186; EX 12 at 207-08; EX 15 at 323.

Based on Ms. Manz' testimony, Employer was premature in terminating Claimant for failure to respond to the termination notice. TR at 93-96. In addition, while Employer argues that there were ample light duty positions available for Claimant, there was no evidence presented showing specific work positions compliant with Dr. Sandor's exact work restrictions as of October 30, 2000. However, there is plenty of evidence to suggest that Claimant was unwilling to return to work *anyway*.

Overall, Claimant also displays an attitude of not being particularly eager to get better from her multitude of ailments. She felt that most of her prescribed treatments or medications did not work. For example, Claimant reportedly tried physical therapy for 18 weeks and felt that it "did nothing." EX 5 at 38; EX 15 at 302. On November 1, 1997, Dr. Miura-Akamine noted that "patient does not want to consider surgery to her neck, despite the fact that we have exhausted all conservative measures without success." EX 5 at 37; TR at 63. On November 30, 1999, Claimant stated to Dr. Miura-Akamine that her antidepressants provided limited relief. Although Claimant was apparently feeling better with a new medication at that time, she expressed the desire to stop work because of her persistent pain and stated that she would "rather live with her pain." Dr. Miura-Akamine also noted that Claimant did not follow up on suggestions from the pain management program. EX 5 at 51-53. On February 11, 2004, despite her continual complaint of pain, Claimant repeatedly resisted trying different medications as well as increasing her dosage because "they all seem to upset her stomach." CX 1 at l, 6.

Claimant explains that she is unwilling to attempt surgery out of fear that she "might he on the wheelchair forever," and because she would need to pay for the surgery. FIX 12 at 186-87. Although I find this a reasonable explanation for her refusal to undergo surgery, it appears to me unreasonable and not credible that Claimant would refuse to try different medications, not follow through with the Pain Clinic's suggestions, and would "rather live with her pain" when she claims to be experiencing severe pain on a continuous basis.

As is already indicated by the evidence, Claimant is unequivocal in expressing her unwillingness to return to work of any type. Even Dr. Ma testified that Claimant told a vocation rehabilitation expert that she doesn't want to do anything but retire as she has a very good husband with four children and Claimant does not do much at home. CX 3 at 119. In addition to Claimant's lack of credibility referenced above, I find that her real motivation not to work is

exposed in her decision to care for her grandchildren, driving them to and from school, and taking them with her and her husband in 2003 to San Francisco from Hawaii. Thus, I find that she has failed to demonstrate a diligent search for employment.

Even if Claimant persuasively testified as to her job search, she failed to offer any corroborating evidence for her account of positions that she applied for on her own. Claimant failed to provide evidence of the numbers, names, job descriptions, or job search protocols to establish due diligence, or at least, evidence of the amount of effort she actually put into the process. Claimant carries the burden on this issue, and I find that overall she has failed to show that she conducted a diligent search for employment. As a result, I conclude that Claimant was partially disabled, beginning January 11, 2005. *See Palombo,* 937 F.2d at 77.

Average Weekly Wage

Employer contends that Claimant's average weekly wage ("AWW") at the time of her industrial injury in July 1998 was $304.00, which is the amount Claimant submitted on her pre-trial statement. See ALJX 2 at 4. Claimant argues that her pre-accident weekly earnings are $355.93, calculated based on the amount Employer referenced on its pre-trial statement. See ALJX 4 at 2.

I find, that section 10(c) is the correct method for calculating Claimant's pre-injury AWW. Section 10(c) may be applied when it would be unreasonable or unfair to calculate the claimant's AWW under sections 10(a) or 10(b). 33 U.S.C. § 910(c); *Matulic v. Director, Office of Workers Compensation Programs*, 154 F.3d 1052, 1057 (9th Cir. 1998). Here, section 10(a) cannot be applied because the evidence indicates that Claimant worked 1,402.74 hours from July 8, 1997 to July 7, 1998, or 67.44% of a 2080 annual work year, which is less than a substantial part, or 75%, of the working days in the year preceding her injury. *See EX 8 at 109-10; Matulic*, 154 F.3d at 1057-58. Section 10(b) also cannot be applied because there is no evidence regarding the wages of other employees. Thus, section 10(c) must be applied, as is typical in situations like this one where the claimant's work is intermittent or discontinuous. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819, 823 (5th Cir. 1991).

Section 10(c) requires the ALJ to determine a sum that "shall reasonably represent the annual earning capacity" of the claimant at the time of injury. 33 U.S.C. 910(c). That figure is then divided by 52, as required by section 10(d), to arrive at the average weekly wage. *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991); *Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207, 211 (1990).

In determining the claimant's annual earning capacity, the express language of section 10(c) provides that the ALJ may consider 1) the previous earnings of the injured employee in the employment in which he was working at the time of the injury, 2) the previous earnings of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or 3) other employment of such employee, including the reasonable value of the services, if engaged in self-employment. 33 U.S.C. 910(c); *Palacios v. Campbell Industries*, 633 F.2d 840, 842 (9th Cir. 1980); *National Steel Shipbuilding v. Bonner*,

600 F.2d 1288, 1291 (9th Cir. 1979). Since annual earning capacity represents "the amount of earnings the claimant would have the potential and opportunity to earn absent injury," *Jackson v. Potomac Temporaries, Inc.*, 12 BRBS 410, 413 (1980), it is also necessary to consider necessary the claimant's "ability, willingness and opportunity to work." *Tri-State Terminals. Inc. v. Jesse*, 596 F.2d 752, 757 (7th Cir. 1979). Thus, while the actual wages earned by the claimant at the time of injury should not be disregarded, they are not controlling. *Hall v. Consolidated Equipment Services*, 139 F.3d 1025 (5th Cir. 1998); *Palacios*, 633 F.2d at 843 (citing *Bonner*, 600 F.2d at 1292).

Here, Claimant worked from July 8, 1997 through July 7, 1998 for Employer. EX 8 at 109-10. From when she started work on July 8, 1997 to when she aggravated her back condition and stopped working on July 7, 1998, she had worked 1,402.74 hours, or part-time (1,402.74/52 weeks = 26.98 hours per week), over 198.75 days. *Id.* Her hourly rate at the time of injury was $9.96. *Id.* at 109.

I find that Claimant's AWW is calculated as follows:

1,402.74 hours worked x $9.96 hourly rate = $13,971.29 (gross earnings).
$13,971.29 divided by 198.75 days worked = $70.30(average daily wage)
$70.30 (average daily wage) x 260 days/year = $18,276.91(average annual earnings)
$18,276.91 (average annual earnings) divided by 52 weeks/year (per section 10(d) = $351.48 (AWW)
$351.48 x .666667 = $234.32 (compensation rate/week).

As a result, I find that Claimant average weekly wage for her part-time work with Employer as of July 7, 1998 is $351.48.

Retained Earning Capacity and Compensation Rate

As discussed above, I find that the four part-time positions of counter attendant, appointment setter, table server, and teller, which were identified by Ms. Figueroa, constitute suitable alternative employment for Claimant. I find that an appropriate entry wage for these positions as of January 11, 2005, which the date these positions were communicated to Claimant and verified by Ms. Figueroa, is $8.14 per hour – the average of the hourly rates for the four positions referenced above ([$6.50+$7.00+$7.25+$11.80[5]]/4=$8.1375). *See* EX 13 at 231-36.

Accordingly, I find that on January 11, 2005, Claimant had a retained earning capacity of $162.80 per week (20 hours X $8.14 per hour). As a result, Claimant is entitled to receive from Employer permanent partial disability benefits from January 11, 2005 through the present and continuing at the compensation rate of $125.79, calculated as 2/3rds of the difference of Claimant's average weekly wage of $351.48 and her retained earning capacity of $162.80 or $188.68.[6]

[5] For the teller position at Hawaii State Federal Credit Union I averaged the $8.69 per hour to $14.90 per hour range extremes to come up with a blended hourly rate of $11.80 ([$8.69 + $14.90]/2=$11.7950) See EX 13 at 235.
[6] $188.68 times 2/3rds (66.67%) equals $125.79.

Medical Benefits

Section 7(a) of the Act provides in relevant part that the "Employer shall furnish medical, surgical, and other attendance or treatment […] for such period as the nature of the injury or the process of recovery may require." 33 O.K. § 907(a). In order for medical expenses to be assessed against an employer, the expense must be both reasonable and necessary. *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Reasonable and necessary medical expenses are those related to and appropriate for the diagnosis and treatment of the industrial injury. 20 C.F.R. § 702.402; *Pardee v. Army & Air Force Exchange Serv*., 13 BRBS 1130, 1138 (1981). A claimant establishes a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984). Claimant carries the burden to establish the necessity of such treatment rendered for his work-related injury. *See generally Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Wheeler v. Interocean Stevedoring Inc*., 21 BRBS 33 (1988).

As I find that medical benefits are never time barred, Employer is responsible for all reasonable and necessary medical expenses stemming from Claimant's work-related neck and lower back injuries from November 3, 1996 to the present and continuing.

CONCLUSION

I find that Claimant's November 3, 1996 claim for disability is time barred under section 12 because she gave Employer late notice which was not excused under section 12(d). I also find that the section 13 statute of limitations was not tolled under section 30(f) as to the November 3, 1996 injury. I also find that Claimant's low back injury was aggravated or accelerated by her cumulative work activities scooping ice cream while with Employer through July 7, 1998. I further find that there is insufficient evidence to conclude that Claimant suffered any work-related psychological injury during the time she was recovering from the work-related neck and back injuries.

Claimant is entitled to temporary total disability benefits from July 27, 1998 through October 30, 2000 at the compensation rate of $234.32 per week. She is also entitled to permanent total disability benefits from October 31, 2000 through January 10, 2005, at the same compensation rate of $234.32 per week. Claimant is also entitled to receive permanent partial disability benefits from January 11, 2005 through the present and continuing at the compensation rate of $125.79 per week. Since medical benefits are never time barred, I find that Employer is liable for reasonable and necessary medical expenses with respect to Claimant's work-related back problems from November 3, 1996 to the present and continuing.

ORDER

Based on the foregoing findings of fact and conclusions of law, **IT IS HEREBY ORDERED** that:

1. Employer shall pay Claimant compensation for temporary total disability due to the aggravated injury to her lower back for the period from July 27, 1998 to October 30, 2000, inclusive, at a compensation rate of $234.32 per week.

2. Employer shall pay Claimant compensation for permanent total disability due to the aggravated injury to her lower back for the period from October 31, 2000 to January 10, 2005, inclusive, at a compensation rate of $234.32 per week.

3. Employer shall pay Claimant $125.79 per week for her permanent partial disability for her unscheduled lower back aggravation, commencing January 11, 2005 and continuing.

4. Employer shall provide such reasonable and necessary medical treatment in regards to Claimant's work-related back condition from November 3, 1996 to the present and such future medical care as may be reasonable and necessary for the treatment of the injury to Claimant's neck and lower back, including surgery, if sought by Claimant.

5. Employer shall receive a credit for previous disability benefits paid to Claimant.

6. Employer shall pay interest on each unpaid installment of compensation from the date the compensation became due until the date of actual payment at the rates prescribed under the provisions of 28 U.S.C. §1961.

7. The District Director shall make all calculations necessary to carry out this order.

8. Counsel for Claimant, *within 20 days after this Order becomes final,* shall submit a fully supported application for costs and fees to counsel for Employer and to the undersigned Administrative Law Judge. Within 20 days thereafter, counsel for Employer shall provide Claimant's counsel and the undersigned Administrative Law Judge with a written list specifically describing each and every objection to the proposed fees and costs. Within 15 days after receipt of such objections, Claimant's counsel shall verbally discuss each of the objections with counsel for Employer. If the two counsel disagree on any of the proposed fees or costs, Claimant's counsel shall within 10 days file a fully documented petition listing those fees and costs which are still in dispute and set forth a statement of Claimant's position regarding such fees and costs. Such petition shall also specifically identify those fees and costs which have not been disputed by counsel for Employer. Counsel for Employer shall have 15 days from the date of service of such application in which to respond. No reply will be permitted unless specifically authorized in advance.

IT IS SO ORDERED.

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GERALD M. ETCHINGHAM
Administrative Law Judge

San Francisco, California